Supreme Court, U. S.
FILED
JUL 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. ~~80~~ 80-33

SMITTY BAKER COAL COMPANY, INC.,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CLAUDE K. ROBERTSON
J. EDWARD INGRAM
Fowler & Robertson
Seventh Floor
First Tennessee Building
Knoxville, Tennessee 37902
(615) 637-4311

Counsel for Petitioner

Of Counsel:

Joseph E. Wolfe
Earls, Wolfe & Farmer
P. O. Box 196
Norton, Virginia
(703) 679-0777

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

7-4-80-60

QUESTIONS PRESENTED FOR REVIEW

1. Did the Fourth Circuit err in holding union conduct, which injured Petitioner, protected by labor's statutory exemption from the antitrust laws nothwithstanding the illegality of such conduct under federal labor laws?

2. Is proof of an express predatory intent to absolutely ruin a single non-unit employer a condition precedent to union liability under the Sherman Act (15 U.S.C. §§ 1 and 2) and Section 4 of the Clayton Act (15 U.S.C. § 15)?

3. Does a union "conspire" in violation of the antitrust laws by:

(a) Imposing through a multiemployer "National" contract an express boycott of all coal produced by non-signatories of the "National" contract;

(b) Replacing the express boycott with a penalty clause imposing economic sanctions on coal purchases from non-signatories to the "National" contract;

(c) Agreeing in exchange to forfeit its bargaining freedom and to uniformly impose the "National" contract on all other bargaining units;

(d) Engaging in concerted "top down" organizing with the economic assistance of favored employees to force recognition and adherence to the "National" contract by non-unit employers;

(e) Illegally striking non-unit employers and refusing to bargain with them thereby

perpetuating the combination, avoiding economic disadvantage to the favored employers, and imposing the multiemployer agreement on such non-unit employers?

4. Did the Courth Circuit usurp the jury's function in violation of the Seventh Amendment by setting aside a finding of conspiracy between the union and non-labor groups by the Jury and the District Court?

5. Did the Fourth Circuit err in affirming the District Court determination that illegal union conduct which injured Petitioner would be sanctioned because it occurred in the context of a national strike and despite the fact that the union had no labor dispute with Petitioner?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Nature of the Case	2
B. Facts Not In Dispute	3
C. The Conspiracy Proven	7
D. Impact of Conspiracy on Petitioner	15
E. The Decision of the District Court	16
F. The Decision of the Fourth Circuit	17
REASONS FOR GRANTING THE WRIT	18
A. Summary	18
B. The Lower Courts Have Misconstrued This Court's Decisions in Pennington And Subsequent Decisions Regarding Conspiracies Between Labor and Non-Labor Groups and Labor's Antitrust Exemption . .	21
C. The Lower Courts Have Misconstrued This Court's Decisions Regarding "Predatory Intent" and Causation Under the Antitrust Laws	27

D. The Courts Below Have Invaded The Province of The Jury in Violation of The Seventh Amendment 30

CONCLUSION 31

Appendix A —

Opinion of the Court of Appeals 34

Appendix B —

Constitutional and Statutory Provisions 84

TABLE OF AUTHORITIES

Cases:

Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 24

Amax Coal Co. v. NLRB, 614 F.2d 872 (3d Cir. 1980) 24, 25

Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616 (1975) 23, 24, 25, 26, 29

Consolidated Express, Inc. v. N. Y. Shipping Ass'n., 602 F.2d 494 (3d Cir. 1979) 26, 28

Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962) 27, 30, 31, 32

Dick v. New York Life Ins. Co., 359 U.S. 437 (1959) 31

FMC v. Pacific Maritime Ass'n., 435 U.S. 40 (1978) 26

Greenville Publishing Co., Inc. v. Daily Reflector, Inc., 496 F.2d 391 (4th Cir. 1974) 28

Hooker Chemical & Plastics Corp. v. NLRB, 573 F.2d 965 (7th Cir. 1978) 24

In Re International Union, U.M.W.A. and BCOA, et al., 165 NLRB No. 49, 1967 CCH-NLRB ¶21,492 (1967) 23

In Re Raymond O. Lewis, et al., 148 NLRB No. 31, 1964 CCH-NLRB ¶13,334 (1964) 23

Larry V. Muko, Inc. v. Southwestern Pennsylvania Trades Council, 609 F.2d 1368 (1979) 23, 29

Meat Cutters Union v. Jewell Tea Co., 381 U.S. 676 (1965) 28

National Society of Professional Engineers v. U.S. 435 U.S. 679 (1978) 27

NLRB v. Enterprise Ass'n. of Steamfitters, 429 U.S. 507 (1977) 29

NLRB v. Iron Workers, 434 U.S. 335 (1978) 25

Perma Life Mufflers v. International Parts, 392 U.S. 134 (1968) 28

Radovich v. National Football League, 352 U.S. 445 (1957) 29

Ramsey v. UMW [Ramsey I], 265 F.Supp. 388, affirmed 416 F.2d 655 (6th Cir. 1969), reversed and remanded 401 U.S. 302 (1971)

Ramsey v. UMW [Ramsey II], 481 F.2d 742 (6th Cir. 1973) cert. den. 402 U.S. 983 . . . 17, 27

Scotia Coal Co. v. UMW, E.D. Ky. 1975, No. 2031, affirmed per curiam No. 76-2485 (6th Cir. 1978) cert. den. Oct. 1978 17

Seymour v. Coughlin Co., 609 F.2d 346 (9th Cir. 1979) cert. den. 48 L.W. No. 45 (No. 79-1491) . . . 24

Smitty Baker Coal Co. v. UMW, 457 F. Supp. 1123 (W.D. Va. 1978) 16

Solar Fuel Co. v. UMW, 346 F. Supp. 789 (W.D. Pa., 1972) aff'd. 481 F.2d 1399 (3d Cir. 1973) 17

South East Coal Co. v. UMW and Consolidation Coal Co., 434 F.2d 767 (6th Cir. 1970) cert. den. 402 U.S. 983 17

Tennessee Consolidated Coal Co. v. UMW, 434 F.2d 767 (6th Cir. 1970) cert. den. 402 U.S. 983 17

UMW v. Pennington [Pennington I] 381 U.S. 657 (1965); 17, 23, 27, 31

Lewis v. Pennington [Pennington II] 257 F. Supp. 815 (E.D. Tenn. 1966) affirmed 400 F.2d 806 (6th Cir. 1968) cert. den. 393 U.S. 983 17

U. S. v. Griffith, 334 U.S. 100 (1948) 28

Western States Regional Council No. 3. v. NLRB, 398 F.2d 770 (D.C. Cir. 1968) 24

Constitutional Provisions:

U.S. Constitution, Amendment VII 2, 31

Statutes:

Clayton Act (15 U.S.C. §4) 2
Sherman Act (15 U.S.C. §§1, 2) 2
28 U.S.C. §158(b), 158(e) 26
28 U.S.C. §158(d) 15
28 U.S.C. §§1254(1), 2101(c) 2

Other Amenities:

Areeda & Turner, *Antitrust Law*, Vol. 1,
¶229, at p. 221 (1978) 28

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. _____

SMITTY BAKER COAL COMPANY, INC.,
Petitioner.

v.

UNITED MINE WORKERS OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PETITIONER, SMITTY BAKER COAL COMPANY, INC., RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THIS CASE.

OPINIONS BELOW

The decision of the Fourth Circuit is not yet officially reported. It is unofficially reported in 1980-1 Trade Cases, ¶63,286 and is reproduced in Appendix A hereto. The decision of the District Court is officially reported at 457 F.Supp. 1123 (W.D. Va. 1978).

JURISDICTION

The judgment and opinion of the Fourth Circuit was filed on April 11, 1980. This Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is respectfully invoked pursuant to 28 U.S.C. §§1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutory provisions involved are Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2); Sections 4 and 6 of the Clayton Act (15 U.S.C. §§15 and 17); Section 20 of the Clayton Act (29 U.S.C. §52); Sections 2, 4 and 6 of the Norris-LaGuardia Act (29 U.S.C. §§102, 104 and 106); and the Labor Management Relations Act, as amended [29 U.S.C. §§141, 151, 157, 158(d) and 158(e)]. Also involved is the Seventh Amendment to the Constitution of the United States. These provisions are reproduced in pertinent part in Appendix B hereto.

STATEMENT OF THE CASE

A. *NATURE OF THE CASE*

Petitioner, Smitty Baker Coal Company, Inc. ("Smitty Baker") brought this suit in 1973 to recover damages for injuries to its business and property as a result of the

blatant conspiracy, strike and boycott aimed at its mining operations in Lee County, Virginia. Respondent United Mine Workers of America ("UMW") was the principal moving entity in the conduct of which Smitty Baker complains. No labor dispute existed between UMW and Smitty Baker. Smitty Baker charged UMW with violations of the Sherman Act.[1] The jurisdiction of the U. S. District Court was invoked under Section 4 of the Clayton Act.[2] The case was tried before a jury in 1975 and submitted on instructions which were unchallenged on appeal. The jury returned its special verdict finding UMW guilty of an antitrust conspiracy with non-labor groups which was the proximate cause of damages to Smitty Baker in the amount of $1,250,000 on November 1, 1975.

Nearly three years later the District Court set aside the jury verdict and entered judgment N.O.V. for UMW. In so doing the District Court affirmed the jury's finding of conspiracy but disagreed that the conspiracy proximately caused damage to Smitty Baker. Almost two years later, on cross-appeals, the Fourth Circuit reversed the District Court and jury findings of conspiracy and affirmed the District Court's grant of judgment N.O.V. to UMW.

B. *THE FACTS NOT IN DISPUTE*

Smitty Baker was a small coal company formed in 1969 by Ralph Baker and his son Smitty. The elder Baker had worked around the mines most of his life, having gone to school only through the fourth grade. (3a) Prior to commencing operations, Baker approached Peabody Coal Company about obtaining a lease of coal lands. Peabody was a large combine which controlled about ninety percent of available coal reserves in Lee County, Virginia, but which

---

[1] 15 U.S.C. §§1 and 2.

[2] 15 U.S.C. §15.

had no mining operations there. Peabody required Smitty Baker to sign the 1968 National Bituminous Coal Wage Agreement as a condition of granting the company two leases. The 1968 National Agreement was one in a series negotiated since the early 1950's between UMW and the Bituminous Coal Operators Association (BCOA) of which Peabody was a member. Smitty Baker had no employees at the time this collective bargaining agreement was imposed upon it. Nor was it contacted by UMW until sometime subsequently. Smitty Baker was not a member of BCOA.

Smitty Baker operated its mines successfully in the next few years. It experienced no difficulty in its mining operations or in marketing its production to the Tennessee Valley Authority. However, on September 30, 1971, the UMW contract with the BCOA expired. UMW had given BCOA the required statutory sixty-day notice of termination. No such notice was given Smitty Baker or other non-BCOA signatories. Recognizing that the UMW—BCOA contract was expiring, and upon learning that UMW intended to strike Smitty Baker even though its labor contract was still in effect, Baker attempted to make arrangements to counter any effect of a strike against BCOA members on the corporation's business. He requested that UMW permit the Smitty Baker employees to continue working without interruption. In exchange Smitty Baker would agree to whatever terms UMW negotiated with BCOA and would apply them retroactively to October 1, 1971. This conditional offer was refused and Smitty Baker's work force went on strike forcing closure of the company's mines, even though no labor dispute existed.

After commencement of the strike, Baker attempted to get UMW to permit employees in rotation to cross the picket

lines to do maintenance work. Maintenance or "dead work" is critical in a coal mine to prevent rapid deterioration from acid mine water and other inherent natural conditions. UMW had traditionally permitted such non-productive maintenance work during strikes. Baker was rebuffed on every occasion. UMW never allowed such maintenance work to be done. UMW never requested or offered to bargain with Smitty Baker for a contract.

Finally, on or about November 15, 1971, UMW and BCOA agreed to their new 1971 "National" contract. The following day UMW requested Smitty Baker to sign a stipulation to be bound by the new UMW-BCOA contract. UMW field representatives did not yet even have the actual contract for Baker to see. Baker refused as he had just the day before hired several Southern Labor Union employees to attempt to salvage the mines. These employees went into the newer of the company's two mines for one shift. When they exited they were assaulted by a mob of UMW members. Threats and abusive statements were made and some violence ensued. The SLU employees never returned to work. UMW and SLU filed unfair labor practice charges which were later said to have been withdrawn.[3]

On December 15, representatives of Peabody and UMW visited Baker to insist that he sign the UMW-BCOA contract. The Peabody representative told Baker that the company's then-expired lease on one of the coal properties would not be

---

[3]The complement of SLU employees was both former supervisors and new employees. UMW and SLU filed charges with the NLRB against each other. SLU withdrew from the dispute and UMW then withdrew its charges. Baker was never given a written confirmation of this by the NLRB or UMW. UMW was unable to produce a copy of such NLRB confirmation at the trial even though UMW argued that it had received one.

renewed by Peabody until Smitty Baker signed the UMW-BCOA contract. On December 17, Baker offered to sign such a stipulation pending NLRB confirmation that all charges had been withdrawn. This would have permitted the employees to return to work at the new wages and benefits for thirty (30) days and to go back on strike if no NLRB confirmation was received by the end of that period. UMW refused this offer although the employees supported it. At this point no one had been in the mines to determine their condition.

Baker then turned the matter over to the company's attorney. Attorneys for UMW and the company began negotiations in late December, 1971. UMW continued to insist on the new UMW-BCOA contract. The company countered with its own proposal which substantially embodied the 1968 contract which had not been terminated No progress was made. By late January 1972, Smitty Baker's employees became so frustrated that they prepared and submitted their own meager document which would have permitted them to do dead work in an attempt to avoid complete destruction of the mines. The agreement of both the company and the Union was obtained.

The employees then entered the newer of the company's two mines for maintenance work only to find substantial damage which was beyond the company's ability to repair. The other mine was too deteriorated and dangerous for the men or federal mine inspectors to even enter. Unable to restore the mines or to even make its payments on the severely damaged equipment, Smitty Baker was forced into a distress sale of its one non-expired lease, equipment and other assets in March 1972.

C. *THE CONSPIRACY PROVEN*

The evidence of the conspiracy is predominantly from the writings, records, minutes and testimony of the named conspirators and their representatives. Since 1950, UMW has forfeited its bargaining freedom by the "straightjacket" agreement with the major coal producers represented by BCOA. BCOA was formed in 1950 by a group of large coal producers for the purpose of promoting "stable, just and harmonious industrial relations *on a national basis.*" BCOA initially represented about 50% of the productive capacity of the industry. Thereafter, departing from its prior practices, UMW negotiated collective bargaining agreements only with BCOA. The ensuing period was one of no strikes against BCOA members. Successive wage and benefit increases were negotiated. These UMW-BCOA contracts were then printed and sent to UMW Districts to obtain the signatures of non-BCOA coal producers. The UMW Districts were not authorized to agree to any other contract with a non-BCOA company. No deviation from the terms of the UMW-BCOA contract was, in fact, ever approved. Offers by non-BCOA producers to bargain for any different contract were consistently met with mob violence, strikes, boycotts and other unlawful conduct by UMW.

Simultaneously with the formation of BCOA, UMW established an International Organizing Committee "to promote an intensified and integrated organizing campaign in the nonunion areas of the Bituminous Coal Industry". By 1952, John L. Lewis, who prior to 1950 was the champion of the coal miner as UMW president, had changed his "tune" and was no longer harping about the greed of the big companies running rampant and the preservation of union jobs. Instead he was advocating increased productivity and a "con-

centration of production into fewer units" with the resultant elimination of the many small productive units in the industry and loss of jobs for UMW members.

By 1956, the UMW-BCOA contract covered approximately 60% of the industry work force. Lewis noted that the National Contract was "tailored to fit the future requirements of constantly progressive industrial techniques" and was "making possible larger combinations of operating units in the country, which is an end greatly desired . . .". With the new concentration of production came concomitant unemployment. From 1950 to 1970 almost 275,000 coal miners —many of them UMW members —lost their jobs.

As the leader of UMW's organizing committee, Tony Boyle concentrated the union's organizing efforts on the non-union areas of the coal fields. Scores of small mines and all the major non-union operations had signed the UMW-BCOA contract by 1956. In that year delegates to the UMW convention were told of the union's success in organizing the West Kentucky Coal Co. and the Nashville Coal Co. —two large southern producers. What the delegates were not told was that UMW had taken control of the stock of those companies at a cost of over 25 million dollars. The acquisition was accomplished through a series of otherwise unsecured stock acquisition loans to Cyrus Eaton by UMW which were foreclosed when Eaton conveniently defaulted. Eaton had no personal liability for the loans. The UMW's stated purpose of the acquisition and organizing was because this non-union coal was "breaking the price of coal down in every market that it could penetrate." After discovery of these acquisitions in the ***Pennington I*** case, UMW sold the stock to Island Creek Coal Company at a loss of over 10 million dollars.

By 1958, the UMW-BCOA combination was threatened from an unexpected source. Unemployed miners with no other means of livelihood began to establish thousands of small mining operations which were not subject to the UMW-BCOA "National" contract. At the same time, the industry encountered a period of slack demand. BCOA operators began demanding commitments from UMW to eliminate the possibility of these non-union companies escaping the "national" contract terms. UMW severely criticized BCOA companies for purchasing or brokering coal not produced under their "National Agreement" and sought commitments to halt the practice. The solution was the Protective Wage Clause (PWC) of the 1958 "National" contract.

Joseph Moody, of the Southern Coal Producers Association and subsequent BCOA Chairman, was deeply involved in the formulation of the PWC. As reflected in the Association minutes, Moody explained the theory behind the PWC as follows:

> In the promulgation of this contract over the years and especially in the past ten years, we have established a wage situation whereby most operators and industry as a whole, had to go to general mechanization of their operations because of the very high cost of labor. In so doing, in the case of the coal industry, there was a major decrease in the number of employees and according to the bureau of labor statistics, there was a drop from 400,000 to less than 200,000. . . . and so we find a surplus of labor throughout the coal fields. The law of supply and demand took over and we discovered that the labor price established by the contract, was not the price established by the number of miners available for work. The situation encouraged

> the establishment of mines, not under the union contract. . . . Lastly the coal market was rather seriously weakened as far as price was concerned as there was a premium on noncontract, low priced coal.

As embodied in the 1958 "National" contract, the PWC had various clauses to deal with the concerns of UMW and BCOA about noncontract, low priced coal. Paragraph A, demanded by BCOA, required the union to enter into only the "National contract" and to fully enforce it against all operators organized by UMW. Paragraph B, demanded by UMW, required signatory operators to boycott coal not produced under the "National" contract. Paragraphs C and E established a "Joint Industry Contract Committee" (JICC) to enforce the PWC. Paragraph D and E required BCOA and UMW to exchange lists of *all* operators "whose operations are under contract with the union" and "all contracts . . . entered into by the Mine Workers with *any person* engaged in the production of bituminous coal." These exchanges helped BCOA to determine which producers would and would not be boycotted and to insure that UMW was enforcing the "National Contract" against all union operators, including non-BCOA signatories.

UMW and the BCOA operators each contributed $150,000 to fund the enforcement activities of the JICC. Formal determinations were made that many companies were in violation of the PWC. However, before further enforcement activities occurred, Congress passed the Landrum-Griffen Act. Its "hot cargo" provisions cast doubt on the legality of the boycott provisions of Paragraph B of the PWC. Thus a resolution was adopted suspending enforcement of Paragraph B to provide the operators with "an official document with important defensive

aspects" in the event they "are confronted with the possibility of lawsuits —including antitrust treble damage suits . . .".

Other provisions of the PWC were not suspended. As JICC minutes of July 27, 1960 reflect:

> It was pointed out by counsel present that certain provisions of the Protective Wage Clause were not affected by the Labor-Management Reporting and Disclosure Act of 1959 and that it was not only the right but the duty of the Committee to continue to function as an instrumentality for the advancement of the interests of the contracting parties to the National Bituminous Coal Wage Agreement.

The PWC was challenged before the NLRB. UMW and BCOA joined in its defense. Nevertheless, the interruption of Landrum-Griffen on the work of the JICC was having its effect. On March 12, 1964, Fox (President of BCOA) wrote to the president of Island Creek Coal Company, (purchaser of UMW's stock in West Kentucky and Nashville Coal Companies):

> The matter of the competition of those in the bituminous industry who are *non-signatories* to the National Bituminous Coal Wage Agreement and thereby not obligated to pay a higher wage scale and the 40-cent royalty has been discussed on many occasions with the United Mine Workers.
>
> I hope that my presentations and the presentations of others in the industry to the officials of the United Mine Workers of America will make them appreciate the seriousness of this situation, to not only the coal companies, but to the United Mine Workers of America as well. [emphasis supplied]

One month later in April, 1964, the new 1964 UMW-BCOA National Bituminous Coal Wage Agreement was announced. Two clauses in this contract carried forward and supplemented the PWC provisions previously challenged before the NLRB.

The new "Eighty Cent Welfare Clause" required signatory operators to pay a forty cent per ton penalty to the UMW Welfare Fund for all coal purchased or acquired from those not signatories to the "National" contract. Thus the absolute boycott was replaced with an economic penalty to encourage a boycott.

Carried forward were the provisions of Paragraph B of the PWC regarding the "Application of Contract to Coal Lands". Prior to 1958, and in fact since at least the Ickes-Lewis Agreement of 1943, UMW collective bargaining agreements had all provided that, "The Operators agree that they will not lease any operating mines subject to this [Agreement] as a subterfuge for the purpose of avoiding this [Agreement]." However, Paragraph B of the 1958 PWC, as carried forward in the express language of the 1964, 1968 and 1971 UMW-BCOA contracts was much broader. This new "Coal Lands Clause" provided that the National Contract "covers the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease . . . at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use." It is this PWC provision as contained in the 1968 National Contract which obligated Peabody Coal Company to require Smitty Baker to sign the UMW-BCOA contract as a condition of leasing its coal land even though Smitty Baker had not yet hired any employees.

Nothing was said about the remaining PWC provisions in the 1964 contract. There was no express rescission of the PWC. UMW argues in this case that it was not included since the 1958 National Contract was not incorporated by direct or indirect reference in the 1964 contract. However, in 1968 the "National" contract included what, at first blush, appears to be a PWC rescission clause. However, this language relates to a "Most Favored Nation" PWC contained in a 1941 UMW contract. This PWC with the most favored nation language was carried forward in the Ickes-Lewis Supplemental Wage Agreement of 1943. It was subsequently rescinded in the various 1947 and 1948 contracts. The 1950 UMW-BCOA contract contained the identical rescission language and the same language was carried forward in the 1952, 1955, 1956, 1958 and 1964 amendments. It had to be reinserted in the 1968 UMW-BCOA "National" contract because the 1968 contract deleted incorporation of the 1950 and 1952 Contracts, and instead, incorporated agreements from 1941 and 1945 which had contained a most favored nation clause denominated as a protective wage clause.[4]

In summary, petitioner proved a tacit agreement between UMW and the large coal producers and their associations represented by BCOA to utilize their "National" contract to force a concentration of the productive units in the coal in-

[4]The rescission obviously relates to the "most favored nation clause" since it refers to provisions of contracts "providing for a protective wage clause and a modification of this Agreement" if a more favorable agreement is entered into by UMW. If there were any real concern over UMW "negotiating" terms different from those in the UMW-BCOA contract, one would think BCOA would insist on "most favored nation" clause. The absence of such a provision is further evidence of the UMW-BCOA "straight-jacket" agreement.

dustry. This was done by UMW's commitment to bargain only with BCOA and in turn to impose the resulting "National" contract on all other units in the industry. The parties expressed their arrangement, previously evidenced only by their conduct, in the 1958 PWC. Reacting to industry conditions and competitive forces they expressly provided for the boycott of coal not produced under their contract. They also expressly limited UMW's bargaining freedom. In the face of the antitrust judgment against UMW in Pennington I, affirmed by the Sixth Circuit in December, 1963, UMW and BCOA dropped the express boycott and forfeiture provisions from their 1964 "National" contract and substituted therefor the "Eighty-Cent Penalty" clause which amounts to nothing but an economic penalty equivalent to a boycott and the "Coal Lands Clause" as modified to facilitate top down organizing by UMW so as by insure that all possible units in the industry were brought under the UMW-BCOA "National" contract.

From 1950 through March of 1972 UMW refused to bargain with any unit in the industry other than BCOA. Consistently since the formation of BCOA, UMW reserved the weapon of a strike to those non-BCOA units which balked at signing the UMW-BCOA contract. BCOA assisted UMW's organizing by first a boycott, then an economic penalty and an expanded coal lands clause. Smitty Baker was forced to sign the UMW-BCOA contract to obtain coal leases. Yet in 1971, when UMW and BCOA had their first real disagreement over contract terms in over twenty years, the balance of the units in the industry were struck even though UMW had not terminated contracts with the non-BCOA units and had no labor dispute with the non-BCOA production units. And notwithstanding that strike against all units, including BCOA, UMW still steadfastly refused to

bargain with any unit but BCOA, thereafter simply imposing the BCOA contract on the balance of the units in accordance with the conspiratorial agreement.

The District Court concurred with the jury that a conspiracy had been proven. However, it concluded that the UMW conduct was exempt from the antitrust laws because national labor policy entitled UMW to strike all bargaining units in the industry although the only labor dispute was with BCOA.

The Fourth Circuit recognized that such an exemption was untenable. It therefore chose to compartmentalize the proofs, reweigh the evidence giving UMW the benefit of every inference, and concluded that there was no proof of a conspiracy and that UMW's conduct was within labor's statutory exemption from the antitrust laws.

D. *IMPACT OF CONSPIRACY ON PETITIONER*

The UMW-BCOA contract was forced on Smitty Baker, as a condition for its leases, by Peabody notwithstanding the fact that Peabody had no mining operations in Lee County, Virginia (although it had a monopoly on available coal lands). Further, Peabody had no contract or commitment to purchase Smitty Baker's coal production. Smitty Baker was brought under the terms of the "National" contract at a time when it had no employees and with no opportunity to bargain as to mandatory and nonmandatory subjects or economic and noneconomic terms. There was obviously no election or NLRB certification.

Smitty Baker had even less control over its destiny when the UMW-BCOA contract expired in 1971. UMW struck the Smitty Baker operations even though its contract had not been terminated as required by statute.[5] Throughout the

[5] 28 U.S.C. §158(d).

strike UMW refused to bargain or to offer to bargain for any contract while it negotiated with BCOA. And then, when Smitty Baker's small capital reserves were depleted and its mines deteriorated beyond the capacity of the company to restore, UMW offered as its only alternative the new BCOA contract. UMW offered no justification for such conduct at trial but, for the first time, on appeal advanced the theory that it struck the Smitty Baker mines to bring pressure on BCOA to agree to a new contract.

E. *THE DECISION OF THE DISTRICT COURT*

The jury returned a special verdict form finding UMW had conspired with the large producers in violation of the antitrust laws and that Smitty Baker was injured as a result of the activities of UMW pursuant to the conspiracy. In granting UMW a judgment N.O.V. the District Court agreed that UMW had conspired with the large producers. However, the Court disagreed with the jury's conclusion that the proven illegal conduct materially contributed to Smitty Baker's injury. He felt that the UMW strike was not part and parcel of an illegal conspiracy. He stated:

> The strike was uniformly enforced as to all employment units organized by UMW, large and small alike. Plaintiff can scarcely be heard to argue that the UMW's refusal to allow plaintiff to continue to operate, under a mere stipulation to be retroactively bound to the new agreement, was a manifestation of a conspiracy to drive small operators out of business. The integrity of a nationwide industrial strike could not be maintained if such variations were allowed to prevail. ***Smitty Baker Coal Co. v. United Mine Wkrs.***, 457 F. Supp. 1123 at p. 1133 (W.D. Va. 1978).

F. *THE DECISION OF THE COURT OF APPEALS*

The Fourth Circuit disagreed with the District Court's analysis as to the existence of a conspiracy between UMW and the large producers. Writing for the panel, Judge Russell undertook a detailed analysis of the *Pennington* line of cases against UMW and various commentary on the decision.[6] Adopting the concurring opinion of Mr. Justice Douglas in *Pennington* as the authoritative expression of the majority's conclusions in *Pennington*, Judge Russell concluded that the following four elements were essential to UMW's liability in this case:

> 1. Agreement with a substantial number of larger employers to establish a wage scale for unit employees; and,
>
> 2. Which wage scale the union and the employer group knew that marginal employers could not afford; and,
>
> 3. Which wage scale the union undertook to impose on the marginal nonmember operators; and,
>
> 4. With the intent to drive these marginal operators out of business. (41a).

---

[6] For other cases involving similar issues under the antitrust laws, see **UMW v. Pennington**, [Pennington I], 381 U.S. 657 (1965); **Lewis v. Pennington**, [Pennington II], 257 F. Supp. 815 (E.D. Tenn., 1966) aff'd 400 F.2d 806 (6th Cir., 1968) cert. den. 393 U.S. 983; **Ramsey v. UMW** [Ramsey I], 265 F. Supp. 388, aff'd by equally divided ct., 416 F.2d 655 (6th Cir.) reversed and remanded 401 U.S. 302 (1971); **Ramsey v. UMW** [Ramsey II], 481 F.2d 742 (6th Cir., 1973); **Tennessee Consolidated Coal Co. v. UMW**, 434 F.2d 767 (6th Cir., 1970) cert. den. 402 U.S. 983; **South-East Coal Co. v. Consolidation Coal Co. and UMW**, 434 F.2d 767 (6th Cir., 1970) cert. den. 402 U.S. 983; **Solar Fuel Co. v. UMW**, 346 F. Supp. 789 (W.D. Pa., 1972) aff'd without opinion 481 F.2d 1399 (3rd Cir., 1973); **Scotia Coal Co. v. UMW**, E.D. Ky., 1975, Civil Action No. 2031, aff'd per curiam, Sixth Circ. No. 76-2485 (1978), cert. den. ___ U.S. ___ (Oct. 1978).

Judge Russell then concluded that Smitty Baker had failed to prove any agreement to establish a wage scale which the union and unit employers knew non-unit employers could not meet; and, that there was no proof that the union had agreed to impose any such wage scale on the plaintiff.

> Thus there was a complete absence of predatory intent on the part of the Union. The wage scale offered the plaintiff by the Union was one that the plaintiff could meet . . . . The plaintiff's reason for abandoning the mines on Peabody's land was . . . because of the strike on October 1, 1971, and, according to its evidence, because of the start-up expenses for reopening the mines at the termination of the strike. (47a).

Concluding that the strike activity and the refusal to allow maintenance work were unilateral, Judge Russell concluded that such actions were protected by labor's statutory exemption noting that "this case is simply not a Pennington-type case at all." (55a). The judgment N.O.V. in favor of UMW was affirmed both for the reason stated by the District Court and for the failure of the plaintiff to adduce sufficient proof of an antitrust violation to permit the submission of such issue to the jury. (56a).

REASONS FOR GRANTING THE WRIT

A. *SUMMARY*

The Court of Appeals and the District Court have unduly compartmentalized UMW's antitrust liability to only those cases falling factually and legally within the four corners of the *Pennington* decisions. Petitioner respectfully urges that such a restrictive view is incorrect. It is true that

much of the proof of conspiracy in this case was originally discovered in the Pennington line of cases. It is also true, as was urged of both Courts below, that some of the conspiratorial terms constituting the antitrust violations against Smitty Baker have not been those directly applied to plaintiffs in the prior Pennington-type cases.[7]

The substantive violation of the antitrust laws here involved is more akin to a refusal to deal (or a conditional refusal to deal) by UMW pursuant to a horizontal agreement with non-labor business competitors of Smitty Baker. UMW has agreed with BCOA that it wil' refuse to deal with employers outside the favored bargaining groups unless and until it has reached agreement with the favored employers. Then and only then will UMW deal with competitors only on the terms reached with the favored group. The antitrust laws have consistently condemned refusals to deal precipitated by competitors urging a particular anti-competitive policy.

Such conduct is not immunized simply because it manifests itself in the context of a purported "national strike". UMW has no right to illegally strike at Smitty Baker, to refuse to deal or bargain, to boycott by refusing to provide employees to do traditional "dead work" or to refuse to negotiate while it is engaged in negotiations with BCOA. This is hardly unit by unit bargaining. Such activities are no more legitimate than UMW's strikes, refusals to deal and boycotts to impose the terms of the UMW-BCOA 'Na-

---

[7] All prior Pennington-type cases involved strikes and imposition of the UMW-BCOA "National" contract. However, no prior case has involved the concerted action of UMW and BCOA in "top down" organizing under the expanded "Coal Lands Clause" of the PWC.

tional" contract on non-BCOA producers in the Pennington-type cases mentioned above.[8]

UMW and the lower courts seize upon this "National Strike" defense with singular sanctity. UMW lamely argues that the principal target of the strike was BCOA. Such a strike against Smitty Baker was illegal even under the labor laws. Smitty Baker's contract with UMW had not expired or been terminated by UMW. And, if UMW is to be believed, the strike at Smitty Baker had an unlawful secondary motive—to pressure BCOA of which Smitty Baker was not a member. However, it is incredulous that striking BCOA's competitors could possibly bring pressure to bear on BCOA. It is more believable that, absent the illicit conspiracy, UMW would pressure BCOA by allowing other units in the industry to continue operations during the strike against BCOA. This would subject BCOA members to potential losses of profits and markets to competitors in other non-BCOA units. The pressure on BCOA by such a non-comspiratorial tactic is obvious.

We candidly agree that this is not a Pennington-type case as Judge Russell perceives those cases. But that begs the question. Smitty Baker was subjected to an illegal strike and refusal to bargain while UMW and BCOA were setting the terms for the entire industry. Once its operations were depleted by this illegal strike, UMW would only offer it the UMW-BCOA "National" contract. Plaintiff could not afford it by that time and, with the deteriorated condition of its mines and equipment, was forced to liquidate its few remaining assets.

---

[8] The Pennington-type cases ID. at fn. 6, involved producers both signatory and non-signatory to the "National" contract. However, none of them were members of BCOA.

In the context of this case, the Sherman Act does not merely condemn agreements to drive small coal producers out of business. It condemns agreements in restraint of the trade of small operators which injure them in their business or property. And proof of such an illicit agreement does not require direct proof of predatory intent. Such intent may be inferred from the conduct of the parties. Nor is it a defense that the UMW's goals may have been objects of legitimate union concern. Legitimacy of purpose does not immunize otherwise illegal conduct. Neither labor policy or antitrust policy sanction such conduct just because the goal is arguably legitimate.

B. *THE LOWER COURTS HAVE MISCONSTRUED THIS COURT'S DECISIONS IN PENNINGTON AND SUBSEQUENT DECISIONS REGARDING CONSPIRACIES BETWEEN LABOR AND NON-LABOR GROUPS AND LABOR'S ANTITRUST EXEMPTION.*

Antitrust Laws

The situation that has developed in the coal industry since 1950 is nothing short of extraordinary. The main producer associations in the country have pooled their efforts through BCOA with UMW to prohibit contracting on any other basis with the smaller units in the industry. Successive substantial across the board wage increases during the 1950's led to forced mechanization or elimination of small producers. Massive unemployment produced a new wave of non-union production which UMW-BCOA addressed through the 1958 PWC. The UMW Journal, official reporter of the union, interpreted the union obligation under the PWC:

> "The U.M.W.A. also agreed, in the clause, that it would not make any agreement on wages, hours or conditions of work on any basis other than is specified in the contract."

The favored employer obligation was an express boycott of non-union coal production and a prohibition against leasing coal bearing lands except to signatories of the UMW-BCOA "National" contract. UMW admits these obligations were a quid pro quo.

With their arrangements under attack before the NLRB, and faced with the Pennington I antitrust judgment against UMW, together with the main producers complaining of "the competition of those in the bituminous industry who are *non-signatories*" the express boycott of the PWC was replaced with the economic penalty of the "Eighty-Cent Penalty Clause" applicable to anyone dealing in coal not produced under the UMW-BCOA "National" contract. In addition, the "Coal Lands Clause" which prohibited leasing to non-signatories was carried forward in subsequent agreements.

Peabody Coal Co., a member of BCOA, owned or controlled about 90% of the available coal reserves in Lee County, Virginia. It leased those reserves but had no mining operations there itself. Yet, pursuant to the obligation of BCOA members under the "Coal Lands Clause" Peabody required Smitty Baker to sign the UMW-BCOA 1968 "National" contract as a condition precedent to leasing Smitty Baker coal reserves.

While operating under this contract, Smitty Baker's operations were struck to bring pressure on BCOA. At the time, UMW had not terminated the 1968 contract with any bargaining unit other than BCOA. Yet all non-

BCOA units, including Smitty Baker were struck. UMW refused to bargain for a contract with Smitty Baker or any other non-BCOA unit because of its continuing agreement to only bargain with BCOA. And, once the 1971 UMW-BCOA contract was agreed to, UMW refused to bargain with Smitty Baker or any other non-BCOA unit other than to demand the economic and non-economic terms of the 1971 National Contract.

This is the very forfeiture of ability to bargain unit by unit which this Court addressed in *Pennington I*, 381 U.S. 657 at 666 (1965). Recently this Court has again recognized that, "Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members." *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 at 622-23 (1975). And, the fact that union goals are to protect work opportunities and to organize as many contractors as possible does not immunize the union from antitrust sanctions. *Connell*, supra at 625; *Larry V. Muko, Inc. v. Southwestern Pennsylvania*, 609 F.2d 1368 at 1377 (1979) [Adams Concurring].

The methods utilized by the union in concert with BCOA in this case are certainly not immune. UMW had admitted that the "Eighty-Cent Penalty Clause" was prompted by the same economic and industrial considerations which led to the PWC. *In Re Raymond O. Lewis et al.*, 148 NLRB No. 31, 1964 CCH-NLRB ¶13,334 (1964). As later stated, regarding this clause, "the economics of the bituminous coal industry are such that non-signatories are faced with two alternatives: either become signatories or lose their signatory customers." *In Re International Union, U.M.W. and B.C.O.A. et al.*, 165 NLRB No. 49, 1967 CCH-NLRB ¶ 21, 492 (1967). Obviously, this penalty

clause does not qualify as a wage standard provision because a penalty is imposed whenever a purchase is made from non-signatory operators without regard to the wage standards of such employers. *Connell*, 421, U.S. 616, at p. 623.

The "Coal Lands Clause" as introduced in 1958 and carried forward in all subsequent contract is not a legitimate work preservation clause. Its application to Smitty Baker was not to preserve work of UMW employees of Peabody. There was none in Lee County much less any in danger of displacement by the Smitty Baker operations. This provision was calculated to satisfy UMW-BCOA objectives elsewhere. *Amax Coal Co. v. N.L.R.B.*, 614 F.2d 872, 883-85 (3d Cir. 1980), declared the identical clause secondary and illegal.

Smitty Baker was not a member of BCOA.[9] *Amax*, supra at 880. UMW did not notify any unit but BCOA that the 1968 contract was terminated. This failure to comply with the notice requirements of Section 8(d) of the Labor Management Relations Act and the contract itself made the strike at Smitty Baker illegal. *Amax*, supra, at 888. The sixty-day notice provisions of the statute are mandatory. *Allied Chemical & Alkali Workers of Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187 (1971); *Seymour v. Coughlin Co.*, 609 F.2d 346 (9th Cir. 1979) cert. den. No. 79-1491, 48 U.S.L.W. No. 45. *Hooker Chemical & Plastics Corp. v. N.L.R.B.*, 573 F.2d 965, 970 (7th Cir.

---

[9] Initially, Smitty Baker offered to be bound by the UMW-BCOA negotiations retroactively if UMW would not strike its operations. This conditional offer was refused and did not constitute an unequivocal intention to be bound in collective bargaining by group rather than individual action. Western States Regional Council No. 3 v. N.L.R.B., 398 F.2d 770, 773 (D.C. Cir. 1968).

1978). UMW's refusal to negotiate except to insist upon imposition of the BCOA multiemployer agreement on Smitty Baker is, in any event, a violation of Section 8(b)(3) of the Act. *Amax*, supra. at 881.

This whole scheme of penalties and "top-down" organizing is perverse to national labor policy. In this case UMW and Peabody used economic weapons to force recognition before Smitty Baker even had any employees. The major purpose of the 1959 addition of Section 8(b)(7) to the Act was to ensure that employees were free to make an uncoerced choice of their bargaining agent. *N.L.R.B. v. Iron Workers*, 434 U.S. 335 (1978). As this Court recognized in *Connell*, supra.,

> "One of the major aims of the 1959 Act was to limit 'top down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." 421 U.S. at 632.

It is respectfully urged that Congress did not intend to create a loophole for concerted "top-down" organizing campaigns conducted by a union and a major employer group.

The conduct offending the antitrust laws in this case is the concerted "top-down" organizing by UMW and Peabody; the illegal strike at the Smitty Baker mines at a time when UMW had no dispute with Smitty Baker; the illegal secondary purpose of UMW to bring pressure to bear on BCOA (if UMW's justification can be believed); and the concerted refusal of UMW to negotiate any collective bargaining agreement with Smitty Baker short of the 1971 UMW-BCOA contract despite the depleted condition of Smitty Baker as a result of the illegal strike and despite

the fact that Smitty Baker's previous contract was still in full force and effect.[10] As noted above, none of these actions are sanctioned under federal labor law. They are all illegal. Congress has drawn the line between legitimate and illegitimate labor organization activities in Sections 8(b) and 8(e) of the Labor Management Relations Act. *Consolidated Express, Inc. v. N. Y. Shipping Ass'n.*, 602 F.2d 494 at 524 (3rd Cir. 1979). There can be no statutory or non-statutory immunity from the antitrust laws for such illegal conduct. This conduct obviously restrained the trade of Smitty Baker and other coal producers not members of BCOA while insulating the BCOA members from competition from such non-member producers during the term of the strike. *FMC v. Pacific Maritime Assn.*, 435 U.S. 40 at p. 48 (1978). Thereafter, it was business as usual for the conspirators—Agreed upon imposition of the terms they had set on the balance of the units in the industry.

The primary effect of the UMW-BCOA agreement goes beyond inhibiting the union from offering any other employer a more favorable contract—a problem which concerned this Court in *Connell*, 421 U.S. at p. 623. Here the agreement prohibited the union from offering any different terms—economic or non-economic—to any employer not a member of the BCOA unit. The union has forfeited all flexibility to adjust its contracting policies to meet the needs of union members or employers.[11]

---

[10] In prior Pennington-type cases, the issue of strike legality for recognition or unfair labor practice purposes as opposed to a UMW-BCOA conspiracy has been one of fact. In the case at bar, no such factual difficulty exists. Recognition had been achieved by the UMW-Peabody imposition of the contract on Smitty Baker and there was no labor dispute with Smitty Baker at the time of the strike.

[11] UMW's District 28 covered Lee County, Virginia. The District 28 President testified as follows:

(Continued on next page)

C. *THE LOWER COURTS HAVE MISCONSTRUED THIS COURT'S DECISIONS REGARDING "PREDATORY INTENT" AND CAUSATION UNDER THE ANTITRUST LAWS.*

The Fourth Circuit held that decisions of this Court in *Pennington I* and *Ramsey I* established a standard of predatory intent to accomplish absolute ruin as a prerequisite to union liability under Section 4 of the Clayton Act. Judge Russell analyzes the cases and concludes there is no room for doubt that there must be an anticompetitive purpose to "ruin" the small marginal competitors in order to establish an antitrust violation in the Pennington-type situation. (34a). He states that this is necessary to furnish evidence of predatory intent. (40a). This standard does not comport with the provisions of Section 4 of the Clayton Act which provides its remedy to anyone injured in his business or property. Absolute ruin is hardly the touchstone of standing in antitrust cases. Further, intent is often inferred where evidence of a conspiracy must come from the conspirators themselves. *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962); *National Society of Professional Engineers v. U. S.*, 435 U.S. 679 at p. 690 (1978). As Mr. Justice Douglas once wrote, it is "not always necessary to find a specific intent to restrain trade or to build a monopoly in

---

[11](Continued)

Q. Do you or have you, I should say, negotiated any district contracts since you have been president of District 28.

A. No, no district contracts. We have done a good deal in negotiating, but the final analysis is the National Bituminous Coal Wage Agreement.

Q. You seek to have coal operators in your area execute that agreement, is that correct?

A. Yes.

Q. Do you have any authority as a district president to deviate from the terms of that agreement?

A. No, sir, in no way.

order to find that the antitrust laws have been violated [as it] is sufficient that a restraint of trade or monopoly results as a consequence of defendant's conduct or business arrangements." *U. S. v. Griffith*, 334 U.S. 100 (1948). See also *Greenville Publishing Co., Inc. v. Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir. 1974).

The jury, the District Court and the Fourth Circuit agree in this case that Smitty Baker was injured by the strike and subsequent actions of UMW at the Smitty Baker mines. (47a). UMW interposed arguments of intervening cause from the hiring of Southern Labor Union employees by Smitty Baker for one day. These arguments were rejected by the jury and ignored by the Fourth Circuit. Yet there is no dispute that the strike and all the consequences thereof was the material cause of Smitty Baker's injury. *Perma Life Mufflers v. International Parts*, 392 U.S. 134 at 143-44 (1968). Under these circumstances, a more appropriate inquiry should have been if there were less restrictive ways for UMW and BCOA to achieve whatever legitimate objectives they had. *Consolidated Express, Inc. v. N. Y. Shipping Ass'n.*, 602 F.2d 494 at p. 517 (3d Cir. 1979); *Meat Cutters Union v. Jewell Tea Co.*, 381 U.S. 676 at 737 (1965) [Douglas dissenting]; see also Areeda & Turner, *Antitrust Law*, Vol. 1, ¶ 229 at p. 221. The burden of establishing the legitimacy of its objectives and the use of reasonable restraints no broader than necessary to accomplish those objectives was on UMW. No such evidence exists except that of conduct and restraints which were illegal under the labor laws and the antitrust laws. *Consolidated Express, Inc. v. New York Shipping Ass'n.*, supra. at p. 517. The actual and potential anticompetitive effects of UMW's conduct involve more than would naturally flow from the elimination of competition over wages and work-

ing conditions. *Larry V. Muko v. Southwestern Pennsylvania*, 609 F.2d 1368 at p. 1373. They demonstrate the ability of a union and a multi-employer bargaining group to stifle or even eliminate competition from competitors of the multi-employer group almost at will. "There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective bargaining agreement." *Connell*, supra. at 625-26. With or without a collective bargaining contract, the union's conduct at the time that it occurred was proscribed secondary activity and in restraint of trade. As such it cannot be saved by arguments that it occurred in a collective bargaining context. *NLRB v. Enterprise Ass'n. of Steamfitters*, 429 U.S. 507 at 520 (1977).

The Courts below have unduly increased a plaintiff's burden in antitrust proceedings involving a labor union. Such action is not justified by the prior decisions of this Court. Once all issues of labor's antitrust exemption are resolved, this Court's language in *Radovich v. National Football League*, 352 U.S. 445 (1957) should control:

> Petitioner's claim need only be tested under the Sherman Act's general prohibition on unreasonable restraints of trade . . . Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws. 352 U.S. at 453-54.

D. *THE COURTS BELOW HAVE INVADED THE PROVINCE OF THE JURY IN VIOLATION OF THE SEVENTH AMENDMENT*

The proofs in this case were submitted to the jury under instructions that were unchallenged by UMW in the Fourth Circuit. The jury found for Smitty Baker and awarded damages which approximated UMW's presentation in mitigation of plaintiff's claimed damages. (Exhibit 54 to trial record). On proper instructions the jury found UMW had participated in a conspiracy in violation of the antitrust laws. The jury found that UMW's conduct in furtherance of that conspiracy had proximately damaged Smitty Baker.

The District Court and the Fourth Circuit chose to disagree with the jury. Such disagreement is not in fact based on the failure of the record to support a conspiracy which has injured Petitioner. Rather, those courts chose to compartmentalize the proof wiping the slate clear after scrutiny of each. Petitioner was not given the full benefit of its proof as required in Sherman Act cases. *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962). Disregarding the proven illegal secondary implications of UMW's conduct in this case the Fourth Circuit found such conduct to be within labor's statutory exemption from the antitrust laws. Ignoring the evidence on the historical changes in patterns of bargaining and the UMW-BCOA reactions over twenty years to competitive threats from non-union and non-BCOA coal producers, the Fourth Circuit has approved conduct which is clearly conspiratorial without giving Petitioner the full benefit of its proofs. That this illegal arrangement has had a long and successful run over the period since 1950 is no reason to sanction its effects under the labor laws or the antitrust laws.

Where Petitioner has proven a loss and a violation by Respondent of the antitrust laws of a nature as to be likely to cause that type of loss, the jury *must* be permitted to draw, from the circumstantial evidence alone, the inference that the necessary causal relation exists. *Continental Ore*, supra. The actions of the District Court and of the Fourth Circuit are an encroachment upon Petitioner's right to jury trial under the Seventh Amendment to the United States Constitution and the province of the jury as principal arbiter of factual disputes. As once stated by Mr. Justice Frankfurter:

> When a court indifferent to the established basis upon which powers have been allocated between the Court and jury is beguiled into rejection of every view which seems to it less reasonable than its own, a violation of constitutional rights might well be said to have occurred. *Dick v. New York Life Insurance Company*, 359 U.S. 437 (1959).

CONCLUSION

It is respectfully urged that this Court now should clarify once and for all the confusion engendered among the bar and the lower federal courts by the three-way division of this Court in *Pennington*. That division has now spawned requirements of "express predatory intent" and "absolute ruin" to burden an antitrust litigant against a labor union far beyond the normal civil antitrust plaintiff. *Pennington* and other decisions have dealt extensively with labor's exemption from the antitrust laws and the need to balance and harmonize national labor and antitrust policies.[12] However, the Fourth Circuit has now

---

[12] The Solicitor General recently stated that, "The proper scope of the labor exemption from the antitrust laws has been a vexing issue for decades"

(Continued on next page)

tilted the scales in favor of exemption without adding the weight of illegal union conduct to the balancing process. Further, in apparent disregard for the rule of *Continental Ore*, the Fourth Circuit has compartmentalized the proofs in this case and, in disregard of the conspiracy findings of the jury and trial court, has rejected every view of the evidence which seems to it less reasonable than its own.

For the reasons assigned, Petitioner prays that the Petiton for Writ of Certiorari be granted and that the Writ issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit entered in Cases No. 78-1814 and No. 78-1815 on April 11, 1980.

Respectfully submitted,

CLAUDE K. ROBERTSON
J. EDWARD INGRAM
Fowler & Robertson
Seventh Floor
First Tennessee Bldg.
Knoxville, Tennessee 37902
(615) 637-4311

Counsel for Petitioner Smitty Baker Coal Company, Inc.

---

[12](Continued) and that, "The contours of the court of appeals' antitrust exemption test can best be determined upon review of a full trial record which demonstrates its practical application." Memorandum for the United States as Amicus Curiae, November 30, 1979 in International Longshoremens Ass'n. v. Consolidated Express, Inc., No. 78-1902 in the Supreme Court at pp. 4-5. This case presents those issues squarely and on a full record. There is no arguable "work preservation" issue in this case as there is in Granddad Bread, Inc. v. Continental Baking Co., No. 79- 1841 in the Supreme Court.

OF COUNSEL:

Joseph E. wolfe
Earls, Wolfe & Farmer
P. O. Box 196
Norton, Virginia
(703) 679-0777

Dated: July 8, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 78-1814

Smitty Baker Coal Company, Inc., Appellant,

-versus-

United Mine Workers of America, Appellee.

No. 78-1815

Smitty Baker Coal Company, Inc., Appellee,

-versus-

United Mine Workers of America, Appellant.

Appeals from the United States District Court for the Western District of Virginia, at Abingdon. James C. Turk, District Judge

---

Argued: June 4, 1979 Decided: April 11, 1980

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and RUSSELL, Circuit Judge.

Claude K. Robertson, J. Edward Ingram (Fowler, Rowntree, Fowler and Robertson; Joseph E. Wolfe, Earls, Wolf & Farmer on brief) for Appellant in No. 78-1814, and for Appellee in No. 78-1815; Stuart B. Campbell, Jr.; E. H. Rayson (Harrison Combs on brief) for Appellee in No. 78-1814, and for Appellant in No. 78-1815.

[2]

RUSSELL, CIRCUIT JUDGE:

This is an action by the plaintiff Smitty Baker Coal Company, Inc. (Smitty Baker) charging a conspiracy by the defendant United Mine Workers (UMW) violative of the antitrust laws,[1] to which it joined an action under the National Labor Management Relations Act. The action under the National Labor Management Relations Act was abandoned and the cause proceeded solely under the antitrust claim. At trial the plaintiff recovered a verdict against the defendant for $1,250,000.[2] After trial defendant moved for judgment notwithstanding the verdict in its favor, or in the alternative for a new trial. Following submission of briefs and full oral argument, the district court, in a carefully reasoned memorandum opinion,[3] denied defendant's motion for a new trial and granted the motion for judgment notwithstanding the verdict for the defendant. In its

[3]

opinion granting the motion it concluded that, while there was sufficient evidence from which the jury might infer a conspiracy under the Sherman Act, the plaintiff had failed to produce any facts to support its contention that it had suffered damages as a result of the conspiracy. The plaintiff appeals from the judgment notwithstanding the verdict in favor of the defendant, and the dismissal of its action; the defendant cross-appeals from the finding of conspiracy.

---

[1] Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2.

[2] After verdict the plaintiff moved for trebling of damages and attorneys fees. Because of later proceedings these motions were not acted upon.

[3] Smitty Baker Coal Co. v. United Mine Wkrs., (W.D. Va. 1978), 457 F. Supp. 1123

So far as pertinent to our decision, the significant facts in this case are as follows: In 1969 Ralph Baker, who had worked about mines most of his adult life, approached a representative of Peabody Coal Company, the owner of considerable coal lands in Lee County, Virginia, with a request for a lease of certain of such lands. Peabody granted the request. The lease dated August 1, 1969, however, was not taken in Ralph Baker's name but in the name of a corporation, which Ralph Baker had had chartered and which is the plaintiff in this action. The sole stockholder of this corporation was Ralph Baker's nineteen-year-old son, Smitty Baker, then a student at Lincoln Memorial University. The capital of the corporation consisted of 100 shares, issued for a consideration of one

[4]

dollar per share, thus giving the corporation a capital of exactly one hundred dollars. No additional stock was ever issued and no other contributions to capital made. The actual payment to the corporation for the stock issued was made by Ralph Baker from his funds. Throughout the life of the corporation the complete control and management of the corporation were always exercised by Ralph Baker; so far as the record indicates, Smitty Baker never took any significant part in such management.

Before beginning operations at its leased site, the plaintiff entered into a collective bargaining agreement with the defendant UMW. Ralph Baker testified he did this because he was told when given the lease by Peabody that he "would have to sign an United Mine Workers Agreement." This demand, it is alleged, was made because of the Coal Lands Clause in the 1968 agreement, of which Peabody was a sig-

natory.[4] The labor agreement accepted by

[5]

the plaintiff under these circumstances was the standard 1968 contract negotiated between the UMW and a multi-employer bargaining group of mining employers. The negotiation of this contract followed a practice long established in the coal industry, whereby a group of the larger operators would join together as a multi-employer bargaining unit known as the Bituminous Coal Operators Association (BCOA) to negotiate on their behalf a labor contract with the negotiating council of the Union. The contract so negotiated bound all the operator-members of the unit. Non-member operators, however, became bound by the contract only if they thereafter agreed to do so.[5]

The plaintiff was not in a position to begin mining operations until about October, 1969. From the outset these operations were successful. Its efforts at selling its coal resulted in a contract with Tennessee Valley Authority (TVA) for the supply to the latter of 2,000 tons of coal a

---

[4]This Coal Lands Clause was in this language:

"As part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its terms which may hereafter [during the term of this agreement] be put into production or use. The operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof."

[5]See Ramsey v. Mine Workers, (1971) 401 U.S. 302, at 305, n. 2.

week. The plaintiff was actually offered later a contract for 2,000 more tons by TVA but it refused the offer. Experiencing no difficulty in its mining operations or in the marketing of its productions, it had a pre-tax profit of $20,985 and an after-tax profit of

[6]

$9,968.12 for the year ending December 31, 1970, on its hundred dollar capital investment. Despite the fact that its operations ceased on October 1 of the year following due to the strike to which we later refer, 1971 was similarly a profitable year, showing after-tax profits of $36,104.38 and a net worth of $57,657.15 at the end of that year.

The relations between the plaintiff and the UMW as the representative of the former's employees were apparently cordial and cooperative during the period of the 1968 labor contract. However, the 1968 collective bargaining contract was, by its terms, terminable by either party on September 30, 1971, provided sixty days' notice of such termination was given the other party. The required sixty-day notice of termination was concededly given by the UMW to the multi-employer group with whom the contract had been negotiated initially but Baker testified his company was not personally given such notice.

[7]

In any event, though, Baker admitted he knew that the contract was being terminated on October 1st and he attempted to make plans to counter any effect of the strike on the corporation's business. Accordingly, on September 30, the date fixed for the contract's termination, Baker called together the local officers of the UMW Union and proposed to them that, if the local would not strike and its members would continue working after September 30, he would stipulate on behalf of the plaintiff to pay, retroactive to October 1,

the wages as fixed in the contract which might later be negotiated between the multi-employer group and the Union. This proposal was refused; and, when the local UMW joined the general strike by UMW members, following the traditional UMW practice of "no contract-no work," the plaintiff's mines were forced to close. No particular discussions between Baker and the UMW took place thereafter until November 16, 1971.

On November 14, 1971, the UMW and the multi-employer bargaining group reached an agreement on a new collective bargaining agreement. Considerable publicity, particularly in the coal field, was given this development. Baker testified, though, that he did not hear of the agreement until two days later. In the meantime, on November 15, 1971, Baker testified he was called to the mines to "sign a contract." At the mines he met a representative of the Southern Labor Union (SLU), a rival labor organization of the UMW. The SLU representative was accompanied by some employees of the plaintiff. He produced 10 signed cards. Three of these cards were signed

[8]

by supervisors in the plaintiff's mines, three by employees of the plaintiff, and four by individuals not previously employed by the plaintiff. Within the hour Baker signed the agreement submitted to him by SLU as the collective bargaining representative of the plaintiff's employees.

The next day, November 16, a representative of the UMW visited Baker and requested him to sign a stipulation agreeing to the terms of the new contract which the UMW had negotiated with the multi-employer group. Baker refused, offering as the only reason for not signing that he had just signed a contract with the SLU and he "didn't think

[he] could sign two contracts." The UMW representative reacted to this statement by declaring that in his opinion Baker in negotiating and executing a contract with the SLU had committed an unfair labor practice.[6] The meeting terminated with the UMW representative stating that he intended to take the matter to the National Labor Relations Board, which he did. An investigation of the charges of the UMW by the Board began in December but before the investigation was concluded, the SLU elected not to contest the charges and abandoned its claim to represent plaintiff's employees. The UMW then with-

[9]

drew its charges, assuming that it was agreed that it was the legal representative of a majority of plaintiff's employees in the bargaining unit.

While the NLRB charges were pending there were no communications between the defendant UMW and the plaintiff. On December 13, however, Baker's wife was told in

[6]The employees of the plaintiff who went on strike at the time the Union claimed the contract had terminated did not lose their status as employees during the strike. The circumstances under which strikers, on termination of the contract, may lose their status as employees are detailed in NLRB v. **Fleetwood Trailer Co.**, (1967) 389 U.S. 375 at 378-79. Those circumstances did not prevail here. Furthermore, the Union remained the presumed bargaining agent for these employees even though its contract had terminated, since the plaintiff made no showing that the Union had lost its status as the representative of a majority of the employees in the unit. **Terrell Machine Company** v. **N.L.R.B.**, (4th Cir. 1970) 427 F.2d 1088, 1090, cert. denied, 298 U.S. 929. Moreover, the plaintiff with its operations completely closed by a strike called by the Union, had every indication that the Union continued to represent a majority of its employees in the bargaining unit and to bargain with and enter into a contract with a rival union in that context could well have been regarded as an unfair labor practice. N.L.R.B. v. **Trosch**, (4th Cir. 1963) 321 F.2d 692, 695, cert. denied, 375 U.S. 993 (1964)

a telephone call from the NLRB that the charges filed by the UMW against the plaintiff had been dropped. Baker told a representative of Peabody the next day that the charges had been dismissed, and expressed a desire to talk about a renewal of the corporation's lease. The representative of Peabody replied that he and a representative of the UMW would call on him (Baker) the next day. On December 15 the representatives of Peabody and the UMW visited Baker. The UMW representative presented Baker with the new contract and asked him to sign it. Baker took no exception to the contract or any of its provisions and expressed a willingness to sign the contract when he was formally advised in writing by the NLRB that the charges had been dropped. Until then he said he would not sign. Thus rebuffed the representative of the UMW left.

The next day Baker had a meeting with the officers of the local UMW at his request. At that meeting he told them, as an inducement for his employees returning to work, that he was

[10]

willing to stipulate to pay the wages and benefits provided in the 1971 contract, and to sign the contract itself as soon as he received a letter from NLRB that the charges filed by the UMW had been dismissed, and that if he did not receive such letter within thirty days the employees could resume their strike. When this conversation was reported to the negotiator for the UMW he promptly communicated with Baker, requesting a more specific statement of Baker's proposal. This resulted in the parties bringing their attorneys into the negotiations, and proposals prepared by the attorneys for the parties, were exchanged between the parties over a period of time.

Sometime in January, 1972, Baker, through his counsel, for the first time raised the point that he could not pay the wage scale and the employee benefits provided in the new 1971 contract. In answer to this contention the UMW requested the opportunity to examine the plaintiff's books.[7] When this request was refused the UMW proposed that Baker resume operations under the new 1971 contract with a rider thereto that if it developed that the plaintiff could not successfully

[11]

operate under that contract, there would be a renegotiation of the terms of the contract. This proposal was rejected by Baker through his counsel, who proposed that work be resumed under the 1968 contract. The UMW, while finding this proposal unacceptable, suggested another meeting. The suggestion was unanswered by Baker. At the end of January the Union employees of the plaintiff submitted to Baker a proposal to perform maintenance work as a prelude for further negotiations. This was agreed to by Baker. When, however, work under this agreement began in February, 1972, it was discovered that a rock fall had occurred in the mines, requiring some repair work. Baker then said that to make the necessary repairs would require more funds than the plaintiff had, and he determined to abandon the development and liqui-

---

[7] This was a perfectly legitimate request under the circumstances, in fact, where an employer asserts financial inability to meet the wage demands in a bargaining agreement, he is obligated to make available to the Union his financial records so that the Union can determine whether the claim is sound and a failure to do so may lay the employer open to an unfair labor charge. **See Labor Board v. Truitt Mfg. Co.** (1956) 351 U.S. 149, 152-53; **N.L.R.B. v. Southland Cork Company,** (4th Cir. 1965) 342 F.2d 702, 706; **Teleprompter Corp. v. N.L.R.B.,** (1st Cir. 1977) 570 F.2d 4, 9; **N. Y. Printing Pressmen & Offset, Etc. v. N.L.R.B.,** (2d Cir. 1976) 538 F.2d 496, 499-501.

date the assets of the plaintiff. Some $42,000 was realized from the liquidation. Baker then began operations in March on another mining tract, with a labor contract, executed before any employees had been hired, with the SLU. This action followed.

In its antitrust complaint the plaintiff stated initially the history of labor relations in the coal industry, and particularly the part the UMW played in that history, during the period of the 50's and early 60's. It alleged an agreement of the UMW with the multi-employer group on a Protective Wage Clause (PWC) for inclusion in the collective bargaining agreement reached by them, the purpose of which, according to the plaintiff's

[12]

allegations, was to boycott "non-union and sweetheart produced coal" and that, "in furtherance of that conspiracy," the UMW, by this Clause, obligated itself not to "enter into, be a party to, or permit any other or different contract than the National Contract, as amended, and * * * [to] fully enforce the National Contract in all other bargaining units." It adds that the PWC, though omitted from the 1964 and 1968 agreements, has "continued [to be enforced by the UMW] to the present time." However in describing particularly the plaintiff's own operations commencing in 1969, the plaintiff directs its complaint at the strike on October 1, 1971, against it by the UMW, which the plaintiff claims was begun in violation of the terms of its agreement with the UMW and was thus in violation of the National Labor Relations Act. It avers that this so-called illegal strike was continued until the plaintiff "was insolvent and * * * forced to abandon its mines." It charged that the Union refused during the strike to negotiate "a contract [with it] with which plaintiff could live" and thereby end the strike. This refusal

the plaintiff charges, was "in furtherance of the terms of the conspiracy with the large coal operators of the industry," as hereinabove enumerated, aimed at forcing the National Contract upon all companies in the industries regardless of their ability to operate under a contract "all of which [was] in violation of §§1 and 2 of the Sherman Antitrust Act" and which was "not for the purpose of improving the wages, hours and working conditions of [UMW's] members."

[13]

The action in due course proceeded to trial. A considerable part of the testimony at trial consisted of testimony and records from certain *Pennington*-type cases earlier tried. After the conclusion of the testimony, the defendant moved for a directed verdict. The motion was refused and the district court submitted the cause to the jury under instructions which treated the action as a *Pennington-Ramsey* type case,[8] later discussed. Thus, tracking largely *Ramsey*, the district court said in its jury instructions:

> "A labor union violates the Sherman Antitrust Act when it agrees with one bargaining unit of employers to impose upon other employers specified wage terms which are harmful or ruinous to the business of such other employers. Any agreement by a union with a business group to secure uniform labor standards throughout the industry is not exempt from the Antitrust Laws, and where a union agrees with one set of employers that the Union will insist on imposing or maintaining on other bargaining units specified wage standards harmful or ruinous of the

[8] Mine Workers v. Pennington, (1965) 381 U.S. 657; Ramsey v. Mine Workers, (1971) 401 U.S. 302.

> business of those employers, it may be liable under the Antitrust Laws for the damages caused by its agreed upon conduct."

The jury returned a verdict for the plaintiff but, upon motion of the defendant, the district court set aside the jury verdict and granted judgment notwithstanding the verdict (n.o.v.) in favor of the defendant.

[14]

In its order granting the motion for judgment n.o.v. the district court first held "that the evidence was sufficient for the jury to infer that a conspiracy did exist between the UMW and certain of the major coal producers." It reached this conclusion on the basis of what it found in this case to be "an almost identical factual situation" to that found in a decision of the Sixth Circuit, *Tennessee Consolidated Coal Co. v. United Mine Wkrs. of Am.* (6th Cir. 1969) 416 F.2d 1192, *cert. denied*, 397 U.S. 964 (1970). The two facts in the record which it cited as supporting this conclusion were "the Protective Wage Clause of 1958," which it found ambiguous and subject to jury construction, and the "Eighty Cent Clause." The district court, however, found "that there was insufficient evidence for the jury to find that the plaintiff's injuries were suffered as a direct and proximate cause of the conspiracy." It was on this latter basis that the district court granted judgment n.o.v. in favor of the UMW.

We address first the conspiracy issue as raised by the UMW. In its conspiracy allegations and largely in its proof at trial the plaintiff sought to identify its claim both factually and legally with the *Pennington* line of cases. Similarly the district court premised its conspiracy ruling on a decision,

which is but an "off-shoot" of *Pennington*.[9] Accordingly, any discussion of the conspiracy ruling must begin with an analysis of the *Pennington* decision itself. Before doing so, however, it seems appropriate to review the statutory and decisional background of *Pennington*.

Pennington represented another step in what was the reconciliation of two conflicting national policies, one expressed in the antitrust laws and designed to prevent monopoly and promote competition, and the other a labor policy favoring collective bargaining over labor standards between employers and employees with the inevitable goal of eliminating competition among workers over wages and labor costs. With such disparate aims, the two policies would inescapably clash unless carefully harmonized.[10] And, as Dean St. Antoine has written,

---

[9] Tennessee Consolidated Coal Co. v. United Mine Wkrs. of Am., 416 F.2d 1192.

[10] In Allen Bradley Co. v. Union, (1945) 325 U.S. 797, 806, Mr. Justice Black stated the problem thus:

> "The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining."

See also Comment, Labor-Antitrust: Collective Bargaining and the Competitive Economy, 20 Stan.L.Rev. 684, 704 (1968):

> "But collective-bargaining agreements over labor standards inevitably have anticompetitive consequences; to infer from these agreements the necessary elements of a conspiracy to restrain trade under the antitrust laws makes no accommodation for the fact that the national labor policy is based upon the conclusion of these agreements."

"To harmonize them, the type of competition which the law is intended to foster (under the antitrust laws) must be carefully distinguished from the type of competition which union-employer bargaining can properly displace."[11] Both Congress and the Supreme Court have sought to achieve a reasonable accommodation of the conflicting aims of the two policies and to mark out the distinction identified by Dean St. Antoine. The Clayton Act, 15 U.S.C. § 17, and 29 U.S.C. 52, and the Norris-LaGuardia Act, 29 U.S.C. § 104, 105, and 113, along with the Wagner Act, 29 U.S.C. § 151, et seq., with its encouragement of collective bargaining between labor and management, represent Congress' contribution to this reconciliation. In these statutes Congress declared explicitly that the "labor of a human being is not a commodity or article of commerce" and that "the antitrust laws [may not] be construed to forbid the existence * * * of labor * * * organizations, * * *, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; * * *."[12]

The Supreme Court, in turn, recognized that, in giving effect to these efforts by Congress to reconcile the two national policies, it had to adapt the antitrust remedies so as to give effect to this distinction of competiton over wages and working conditions from competition in the sale and

---

[11] St. Antoine, Collective Bargaining and the Antitrust Laws, 115 Pitt. Legal J. 25 (1967).

[12] 15 U.S.C. § 17

marketing of goods and services and to "the strong labor policy favoring the association of employees to eliminate competiton over wages and working conditions."[13] With these ends in mind, it has sought to establish guide lines for reconciling the two declared congressional policies and, in so doing, has gone on to create what it has described as a non-statutory exemption[14] in favor of labor, which protects wage competition from the prohibition of the antitrust laws even though this competition affects price competition among employers.[15]

The first case in which the Supreme Court began this modern attempt to harmonize the two conflicting policies was *Apex Hosiery Co. v. Leader*, (1940) 310 U.S. 469, a case cited and followed in *Connell Co. v. Plumbers & Steamfitters*.[16] In *Apex* the Supreme Court held that no activity whether by a

---

[13]This point was made recently by Mr. Justice Powell in **Connell Co. v. Plumbers & Steamfitters,** (1975) 421 U.S. 616, 622, **reh. denied,** 423 U.S. 884, where, speaking for the court, he said that the various Congressional declarations of labor policy "require[d] tolerance for the lessening of business competition based on differences in wages and working conditions."

[14]The commentator in **The Supreme Court, 1974 Term, 89 Harv. L. Rev.** 47, 236, n. 13, finds "[t]he distinction between 'statutory' and 'nonstatutory' exemptions, however, is somewhat misleading. All the major cases involving labor's antitrust exemption have purported to accommodate the Clayton, Norris-LaGuardia, Wagner, and Sherman Acts."

[15]**Connell Co. v. Plumbers & Steamfitters,** 421 U.S. at 622.

[16]310 U.S. at 503-04.

We date the "modern" attempt at reconciliation from the enactment of the Norris-LaGuardia Act which made obsolete much of the earlier decisions. **See Allen Bradley v. Union,** 325 U.S. at 805; Levy, **The Connell Construction Company Case: Antitrust Liability** 5 **San Fernando Valley L. Rev.** 259, 271 (1976).

In the Levy article, the author says:

> "The **Apex** decision came in 1940 when there were six new Justices on the Supreme Court appointed by President Roosevelt. This was the beginning of the reinterpretation of antitrust legislation and its impact on labor unions."

[18]

union or anyone else, was within the proscription of the Sherman Act unless it had or was intended to have an effect on "commercial competition." It then proceeded to eliminate wage competition from the term "commercial competition," as used by it;

"* * *

"[A]n elimination of price competition based on differences in labor standards is the objective of any national labor organization, *but this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.*" (Italics added)[17]

After thus exempting price competition arising out of the elimination of differences in wage rates from the type of competition contemplated under the antitrust prohibitions,[18] the

[19]

Supreme Court one year later in *United States v. Hutcheson*, (1941) 312 U.S. 219 addressed more specifically the statutory exemptions in favor of labor organizations, saying:

---

[17] 421 U.S. at 636.

[18] See Connell, 421 U.S. at 622:

"The nonstatutory exemption [for labor from the antitrust laws] has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employees, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws."

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."[19]

However, in *Allen Bradley Co. v. Union*, 325 U.S. 797, the Supreme Court was confronted with the question of whether a labor organization committed an antitrust violation when, "in order to further their own interests as wage earners," it joined in a conspiracy of employers to monopolize and fix prices in an industry. In answering this question, the court said that a union may not, even though it is pursuing its own goals in so doing, "with impunity aid and abet business men who are violating the [Sherman] Act," for "Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create monopolies and to control the marketing of goods and services."[20]

---

[19] 312 U.S. at 232.

Cf. Connell, 421 U.S. at 625. There, the court seems to hold that a "most favored nation" clause in a non-collective bargaining agreement with employers that restrains the "business market," as distinguished from the "wage market," is without labor's exemption but suggests that, if the agreement is a part of a collective bargaining agreement the result would not be the same. This appears to be the import of the following statement in the opinion:

> "There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an anti-trust exemption if it were included in a lawful collective bargaining agreement." pp. 625-26.

[20] 325 U.S. at 808.

In short, by joining in a business conspiracy by employers which is in violation of the antitrust laws the Union forfeits its right to shelter under labor's exemption and becomes liable with the employers under the antitrust laws. But, more importantly, as several commentators have emphasized, "What *Allen Bradley* holds is that the Union's liability under the antitrust laws in these circumstances, apart from any issue of exemption, arises out of its participation in a conspiracy intended to achieve a restraint of commercial competition by the business interests."[21]

---

[21] 325 U.S. at 807.

The holding in Allen Bradley was summarized by Professor Handler in **Recent Antitrust Developments-1965**, 40 **N.Y.U.L.Rev.** 823, 835 (1965):

> "What would be an antitrust infraction for a group of employers acting in their capacity as competing sellers or buyers is not immunized by reason of labor's complicity."

For another summarization of Allen Bradley **see** Bernhardt, **The Allen Bradley Doctrine: An Accommodation of Conflicting Policies**, 110 **U.Pa.L.Rev.** 1094, 1107 (1962):

> "The **Allen Bradley** doctrine is concerned with the labor exemption being used to shelter employer violations from the antitrust laws. Therefore, the employer participation in a conspiracy found to violate the antitrust laws under the doctrine must itself amount to a violation independently. **The employer activity must be of the kind that business interests would be likely to undertake in the absence of the union rather than mere cooperation with the union in the achievement of typical Union goals.**" (Emphasis added)

[21]

It was against this background that the Supreme Court approached *Pennington*. The plaintiff therein was a small nonmechanized coal mining operator. His complaint was that the defendant Union had participated in an antitrust conspiracy by "join[ing] hands with organized business to drive marginal operators out of existence,"[22] "all for the purpose of eliminating [such marginal operators] from the industry, limiting production and pre-empting the market for the large, unionized operators."[23] As a result of the conspiracy, he claimed his business had been destroyed. The action had arisen in the mid-1950's and in the early 1960's during the period of large scale mechanization of coal mining. It was the plaintiff's theory that, in return for the agreement of the large operators to substantial wage increases in the collective bargaining negotiations, the Union agreed not to oppose mechanization and —critical to the action —had, in the collective bargaining negotiations during the period, undertaken at the behest of the multi-employer group, to impose on the marginal non-member operators such as the plaintiff the same substantial wage scales secured by it from the large, mechanized

[22]

operators in order to eliminate these marginal producers as competitors in the commercial business of coal marketing. In pursuance of this agreement, the Union and the multi-employer group began a systematic pattern of wage

---

[22] Mine Workers v. Pennington, 381 U. S. at 674 (Douglas, J., concurring).

[23] See Mr. Justice White's summarization of plaintiff's claim in 381 U. S. at 664.

increases which they knew the marginal operators such as the plaintiff could not meet and did this with the intent of driving these marginal operators out of business as competitors of the then-members of the multi-employer group. This obligation of the Union to impose a uniform wage scale on the industry for these anti-competitive purposes was allegedly formalized in a Protective Wage Clause (PWC) in the 1958 collective bargaining agreement negotiated between the Union and the multi-employer bargaining unit (BCOA).[24]

---

[24] The Clause was described in **Ramsey v. United Mine Workers of America,** a related case, as "the central legal document" in the case (481 F.2d at 752) and in **Solar Fuel Company v. United Mine Workers of America,** (W.D. Pa. 1972) 346 F. Supp. 789, 792, **aff'd.,** 481 F.2d 1399, **cert. denied,** 416 U.S. 909 (1974), another like case, as "the heart of the matter."

The Clause provides:

> "During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto."

This is in effect a "most favored nation" clause. The validity of such a clause, in the antitrust context, is covered in **Associated Milk Dealers, Inc. v. Milk Drivers U., Local 753,** (7th Cir. 1970) 422 F.2d 546, 554. Moreover a "most favored nation" clause, which is what the PWC was, is within the definition of a mandatory collective bargaining agreement. **Dolly Madison Industries,** (1970) 183 N.L.R.B. 1037. In this area of mandatory bargaining, the rule of exemption is especially appropriate. **See Meat Cutters v. Jewel Tea,** (1965) 381 U.S. 676, 689:

> "Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects."

[23]

Assuming that the Protective Wage Clause was to be deemed ambiguous, and assuming, when considered in the light of the circumstances of its adoption, that it did represent an absolute obligation by the Union to impose the wage scale set in the contract with the multi-employer group on all other employers, the legal questions presented in the case were whether the action of the Union under the Clause would, first, be exempt from the antitrust law, and, if not exempt, under what circumstances, if any, would such

[24]

action constitute an antitrust violation.[25] In deciding the case and in resolving these basic issues the court divided

---

[25] In any antitrust suit against a labor organization, it is not sufficient merely to find that the activity of the labor organization was without the labor exemption; there must in addition be proof of an antitrust violation itself. This point was noted in **Apex** where the court said that "activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act." 310 U.S. at 512.

Recently in **FMC v. Pacific Maritime Assn.**, (1978) 435 U.S. 40, 61 the Supreme Court reiterated the same thought:

> "It is plain from our cases that an antitrust case need not be tried and a violation found before a determination can be made that a collective-bargaining agreement is not within the labor exemption, just as it is clear that denying the exemption does not mean that there is an antitrust violation."

The court then added as a footnote to this statement:

> "In **Connell Construction Co. v. Plumbers & Steamfitters**, 421 U.S. 616 (1975), for example, the Court, after concluding that the agreement in question was not entitled to the non-statutory labor exemption from the antitrust laws, remanded for consideration whether the agreement violated the Sherman Act. See also **Meat Cutters v. Jewel Tea**, 381 U.S. 676, 688-689 (1965) (opinion of White, J.) n. 19 at p. 61.

Kheel, **Labor Law**, § 48.03[3], 48-49, vol. 10 (1977), is to the same effect.

> "Two issues involving the labor exemption seem fairly well settled. First, loss of the exemption is not tantamount to a finding of antitrust

(Continued on next page)

into three groups, each composed of three Justices. Mr. Justice White, who wrote what is generally referred to as the Court's opinion, spoke for one group. Mr. Justice Douglas, writing for another group, concurred in Mr. Justice White's opinion, but, in so doing, gave his construction of Mr. Justice White's opinion. Mr. Justice Goldberg, speaking for a third group, dissented by con-

---

[25](Continued) liability. Once the exemption is lost, a separate determination of the alleged antitrust violation must be made in which the plaintiff is required to prove his case by a preponderance of evidence. Second, at least for purposes of the non-statutory exemption, a claim of exempt status is not limited to a labor organization, i.e., an employer may assert the exemption."

In the Comment, **Antitrust Law-Most Favored Nation Clause and** Labor's Antitrust Exemption, 19 **J. Pub. L.**, 399 at 403, n. 29, the editor says:

"Even when it is determined that a [most-favored nation] clause is beyond the scope of the exemption, it does not automatically follow that every case will result in an antitrust violation. That is to say, once an agreement is placed beyond the protection of the exemption, it remains to be proved that a violation has occurred; and in the **cases claiming an alleged conspiracy under the Sherman Act, predatory intent is an integral part of such proof.**" (Emphasis added)

Levy, 5 **San Fernando Valley Law Review** at 278 declares:

"**Pennington,** however, required proof of predatory intent to find that a 'most-favored nations' clause violates antitrust statutes."

And in **Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.,** (5th Cir. 1974) 504 F.2d 896, 904, the court said:

"In effect the court placed the exemption issue and the issue of liability on the merits before the jury under one instruction. Perhaps the preferable practice would be to separate them."

cluding generally that labor's exemption extended to any subject of mandatory bargaining in the collective bargaining process.

Mr. Justice White began his opinion by declaring that it was perfectly legitimate for a Union to "conclude a wage

[25]

agreement with the multi-employer bargaining unit" and to seek "as a matter of its own policy, and not by agreement with all or part of the employers of that unit, . . . the same wages from other employers."[26] From this point in his opinion he proceeds by focusing primarily on the exemption question[27] and only

---

[26] 381 U.S. at 664.

[27] He phrased the question presented by the appeal as follows:

"The question presented by this phase of the case is whether in the circumstances of this case the union is exempt from liability under the antitrust laws." 381 U.S. at 661.

He concluded his opinion with the statement:

"Thus the relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws." 381 U.S. at 669.

The author of the Comment on **Connell** in 89 **Harv. L. Rev.** at 242, no. 63, offers a reason for this focus by Mr. Justice White on exemption by observing that this was the significant issue in the case since "[t]he district court provided the Pennington Court with an explicit finding that the union intended to drive out the smaller operators." This "explicit finding" was sufficient to establish a substantive antitrust violation (the second issue in the case), leaving only the issue of the applicability of the exemption (the first issue in the case).

[26]

incidentally on the issue of an antitrust violation. He held that "a union forfeits its exemption from the anti-trust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units."[28] He predicated such ruling on the reasoning that the Union, by such an agreement, gave up its freedom to bargain with other employers on terms different

[27]

from those stated in the agreement. He seems to have accepted the district court's construction of the Protective Wage Clause as ambiguous on whether it imposed an obligation on the Union to compel all other employers in the industry with whom it bargained to comply with the wage scale as set forth in the multi-employer agreement and assumed that if it were construed as imposing such an obligation on the Union, the agreement by the Union to such a provision would be without labor's exemption. Having reached this conclusion, he then tersely turned to the second and crucial issue of an antitrust violation and said:

> "One group of employers may not conspire to eliminate competitors from the industry and the union is liable [under the Sherman Act] with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers of the industry."[29]

---

[28] 381 U.S. at 665.

[29] 381 U.S. at 665-66.

It is obvious that this latter declaration in Mr. Justice White's opinion on the issue of an antitrust violation is in effect a restatement of the ruling made in *Allen Bradley* and in his concurrence Mr. Justice Douglas, speaking for his group of three Justices, so construed Mr. Justice White's opinion ("As we read the opinion of the Court, it reaffirms the principles of *Allen Bradley Co. v. Union*, 325 U.S. 797 * * *"). On the basis of this construction, Mr. Justice Douglas then formulated the issue in the case to be submitted by an appropriate instruction at retrial.[30] He said:

> "On the new trial the jury should be instructed that if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws."[31]

---

[30] The court ordered retrial for error in the instructions on an issue unrelated to those raised here.

[31] 381 U.S. at 672-73.

This language in Mr. Justice Douglas' opinion caused the author Professor Meltzer in **Labor Unions, Collective Bargaining, and the Antitrust Laws**, 32 **U. Chi. L. Rev.** 659, 720-21, to comment:

> "Thus, Mr. Justice Douglas' opinion rested explicitly on the existence of a predatory purpose."

[29]

Later in his opinion Mr. Justice Douglas, by way of further clarification, emphasized that the "purpose" requirement in his instruction consisted of both "knowledge" that the marginal operators "would be driven out of business" and "intent" to do so.[32]

Mr. Justice Douglas' construction of Mr. Justice White's opinion and his statement of the circumstances under which an antitrust violation against the Union could be found has been considered a proper summarization of the decision of the court in *Pennington*.[33] Without the concurrence of Mr. Justice Douglas and those Justices joining him, Mr. Justice White's opinion would have lacked the necessary majority and it was only the gloss put on it by Mr. Justice Douglas' opinion that gave it the required concurrence.[34] Because of this, Mr. Justice Douglas' construction of Mr. Justice White's opinion has been looked to as the authoritative expression of the conclusions reached by the majority in *Pennington*. This unquestionably was the view of the district court on remand in *Pennington*. Thus that court, after reviewing both Mr. Justice White's and Mr. Justice Douglas' opinions, said:

[30]

> "Upon careful consideration, the Court has reached the conclusion that the *Pennington* case teaches that it is necessary to find predatory intent

---

[32] 381 U.S. at 675.

[33] See Consol. Exp., Inc. v. N. Y. Shipping Ass'n., (3d Cir. 1979) 602 F.2d 494, 516; Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc., 504 F.2d at 903; Associated Milk Dealers, Inc. v. Milk Drivers U., Local 753, (7th Cir. 1970) 422 F.2d 546, 554.

[34] See Consol. Exp., Inc. v. N. Y. Shipping Assn., 602 F.2d at 516.

to drive small coal operators out of business in order to hold the employer and Union for a violation of the Sherman Act."[35]

That construction of *Pennington*, which in effect adopted the approach of Mr. Justice Douglas' concurring opinion, was approved on appeal to the Court of Appeals and the dismissal of

[31]

the antitrust claim was sustained,[36] 400 F.2d 806, 814 (1968).[37] The Circuit Court, in thus sustaining the District Court, said:

---

[35] **Lewis v. Pennington,** (E.D. Tenn. 1966) 257 F. Supp. 815, 829.

This opinion of the district court has been summarized in the article by Di Cola, **Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering,** 33 **U. Pitt. L. Rev.** 705, 726 (1972):

"On remand the **Pennington** case was tried before District Judge Taylor, sitting without a jury. After reviewing the Supreme Court's decision, Judge Taylor concluded that a finding of predatory intent to drive small coal companies out of business was necessary to hold the employer and union for a Sherman Act violation. He also emphasized that Mr. Justice White's second footnote indicated that the antitrust laws were 'not designed to protect marginal operators' and that 'ill effects alone on marginal operators [are] not enough to show intent.' Thus Judge Taylor adopted the Douglas 'reading' in **Pennington** with emphasis on the sufficiency of evidence relating solely to marginal producers' damages (White). The requirement of additional proof of predatory intent was crucial here in that the District Judge stated that the 'preponderance of proof' showed that all but one of the plaintiffs could not afford to pay the wages and royalties provided for in the 1950 industry-wide agreement as periodically amended. By centering his opinion on predatory intent, Judge Taylor managed to harmonize the White and Douglas opinions better than anyone could have expected."

[36] The plaintiff in **Pennington** had stated a common law claim under Tennessee law based on evidence of violence and intimidation by the Union. That claim was disposed of in 257 F. Supp. at 864, **et seq.** The damages awarded in those claims to the various plaintiffs were affirmed in **Dean Coal Company v. United Mine Workers of America,** (6th Cir. 1970) 421 F.2d 1380.

[37] **Certiorari** of that decision of the Circuit Court was **denied,** 393 U.S. 983, **rehearing** was **denied,** 393 U.S. 1045 (1969).

"We thus understand *Pennington* to teach:

1) a conspiracy between employers and labor formed with the intention of driving competitors out of business is a violation of the Sherman Act;

2) 'predatory intent' (as used by Mr. Justice White (381 U.S. at 668, 85 S. Ct. 1585) and by Judge Taylor) is merely shorthand, employed to describe this anti-competitive conspiracy; and

3) such an anti-competitive conspiracy must be established by 'clear proof.'"[38]

[32]

Subsequently in *Ramsey v. United Mine Workers of America*, (E.D. Tenn. 1967) 265 F. Supp. 388, a case like *Pennington*, the Court was again called upon to determine whether "predatory intent" was an essential element in an action against a labor organization whose activities might not qualify for exemption under the Clayton Act. The district court seems to have so concluded.[39] Such decision was affirmed by an equally divided court in 416 F.2d 655 (6th Cir. 1969). Both groups in the Circuit Court filed opinions explanatory of their differences. The point of difference in the two opinions was limited strictly, as Judge O'Sullivan, speaking for those members who would reverse, made plain, to whether the requirement of "clear proof" under the Norris-LaGuardia Act, 29 U.S.C.

---

[38] In Ramsey v. Mine Workers, 401 U.S. 311, the court found that "clear proof" in the Pennington rule meant preponderance of the evidence. In the retrial of Pennington Judge Taylor had held that whether "preponderance" or "clear proof" was used the result would be the same.

[39] 265 F. Supp. 398-99.

§ 106, related to the evidence of an antitrust violation or simply to "the determination of the authority" of the individual union officers to act for the Union.[40] There was no conflict in the two opinions on the correctness of the construction given the *Pennington* Supreme Court decision in *Lewis v. Pennington*, 400 F.2d at 813-14, *i.e.*, that a conspiracy of employers and labor "formed with the intention of driving competitors out of business" would be a violation of the Sherman Act, but that without such "predatory intent" there could be no violation. See 416 F.2d 660-61 and 663 (opinion of Judge Edwards) and 416 F.2d at 673 (opinion of Judge O'Sullivan). Judge Edwards also in his opinion went on to justify the court's reliance on its previous ruling in *Pennington II* that "predatory intent" was a requirement for an antitrust violation in that context.

[33]

He said:

> "The Supreme Court had granted certiorari in relation to this court's first decision in the same case [*i.e.*, *Pennington I*] and had remanded it with instructions for retrial. If the trial court, or this court, had interpreted those instructions erroneously in the course of retrial or appeal, we find it difficult to believe that the Supreme Court would have ignored the error." 416 F.2d at 661.

There was an appeal from this opinion of the divided court. The Supreme Court, in its opinion on appeal, directed its attention primarily to the measure of proof standard to be applied in the case, i.e., whether "clear

---

[40] 416 F.2d 661.

proof" or preponderance of evidence is required in sustaining a claim of conspiracy, and it was on this issue alone that the Supreme Court in that case divided. The Court, though, refused to decide, at the request of the plaintiff, that the language of the Protective Wage Clause (PWC) constituted a per se illegal conspiracy. The Court was also requested by the Union to reconsider its holding in *Pennington*. The Court refused to do so but in so doing confirmed Mr. Justice Douglas' construction of the *Pennington* case as essentially reaffirmation of *Allen Bradley*.[41] Thus Mr. Justice White, in denying the request, began by quoting from *Allen Bradley*:

> "We know that Congress feared the concentrated power of business organizations to dominate markets and prices. . . . A business monopoly is no less such because a union participates, and such participation is a violation of the Act."

Mr. Justice White continued:

> "Hence we also adhere to the decision in *Pennington*: '[T]he relevant labor and antitrust policies compel us to conclude that the alleged agreement between
>
> [34]
>
> UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws.' 381 U.S. at 669. Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed-upon conduct."[42]

---

[41] 325 U.S. 797.

[42] 401 U.S. at 313.

That language, though not as clear as Mr. Justice Douglas' language in *Pennington*, leaves no room for doubt that there must be the anticompetitive purpose to "ruin" the small marginal competitors in order to establish an antitrust violation in the *Pennington*-type situation. Mr. Justice Douglas in his dissenting opinion in this case was similarly clear on the requirements for an antitrust violation under the circumstances relied on in that case. He stated the charge against the defendant in that case to be an agreement between the employer-group and the union "to force some (including petitioners) out of business," and "to impose a wage scale upon the total industry which had the purpose and effect of driving the small, marginal operators out of business." On the basis of these charges he concluded that only if it were established that the purpose of the agreement was "to do in one or more operators" was there an antitrust violation.[43]

[35]

On remand of *Ramsey* for retrial under the measure of proof standard established by the Supreme Court, the district court, on the basis of Mr. Justice White's language at 401 U.S. 313, quoted above, ruled:

> "The foregoing language to which emphasis has been added would appear to have eliminated any need for proof of predatory intent, and to have established a per se rule of labor union antitrust liability *where it is made to appear by a proper standard of proof that the Union has agreed with one or more employers to maintain specified wage standards in negotiations with other employers and where such wage standards are shown to be ruinous to the business of the other employers.*" (Italics added) 344 F. Supp. at 1033.

---

[43] 401 U.S. at 316, 317 and 320.

It will be noted that while the district court said that under its construction of *Ramsey*, it was unnecessary to prove "predatory intent" as an element of plaintiff's action, it did follow Mr. Justice White's language to the effect that, in order to make out an action, the plaintiff had to establish "by a proper standard of proof" two facts: First, "that the Union has agreed with one or more employers to maintain specified wage standards in negotiations with other employers," and two, that "such wage standards are shown to be ruinous to the business of the other employers." Implicit in these requirements is the necessity for finding that the agreement had an anti-competitive purpose, i.e., to drive "the other employers out of business" for the benefit of the employer-parties to the agreement. As so construed the ruling of the district court is simply following the basic requirements of proof of a restraint of trade under Sections 1 and 2 of the Sherman Act. On appeal of this decision of the district court, the Court of Appeals affirmed but in so

[36]

doing it reiterated its prior conclusion in *Ramsey* that predatory intent (which in essence is no more than an anti-competitive purpose) is an essential element in a labor organization's antitrust liability.[44]

Subsequently, in *South-East Coal Co. v. Consolidated Coal Co.*, (6th Cir. 1970) 434 F.2d 767, the Sixth Circuit, confronted again with the problem of construing *Pennington* and *Ramsey*, summarized its view of those decisions as follows:

> "Reviewing the *Ramsey* decision's interpretation of *Pennington*, four conclusions may be drawn appli-

---

[44] 481 F.2d at 755.

cable to the present dispute. First, the National Agreement containing the Protective Wage Clause is, on its face, a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions. Second, if this agreement was made or entered into by the union in pursuance of its own self interests, there are no grounds for concluding a violation of the antitrust laws. Third, if however, the employers and union entered into this contract with the conscious knowledge or intent that it would be used to drive competitors out of business (more than the incidental effects caused by the adoption of a uniform wage agreement which may result in certain operators not being able to function profitably), then a violation of the antitrust laws has occurred. Fourth, it is this either expressly or impliedly agreed-upon use of the valid contract, that is, that it will be used to drive competitors out of business, that comprises the agreement or conspiracy which is illegal for purposes of the antitrust laws. Without deciding the question of the legality of the '80-cent clause' suffice it to be said that these conclusions are also applicable to that provision." 434 F.2d at 782.

It also in this same case approved the following jury instructions given by the district court at trial:

[37]

"'You are instructed that if you believe there was an industry-wide collective bargaining agreement, whereby employers and the union agreed on the wage scale that exceeds the financial ability, of some small operators, including the plaintiff, to pay, and that the agreement was made for the purpose of forcing some employers, including the plaintiff, out of business,

or injuring its business, and you believe that the defendants, the Consolidation Coal Company and the United Mine Workers, deliberately entered into and participated in such an arrangement, and that the result of such an arrangement was the sole cause of damage, if any, to the plaintiff, then you will find for the plaintiff.'"[45]

It would appear established beyond controversy by these Sixth Circuit decision, particularly its last in *South-East Coal*, that for an agreement between the Union and the multi-employer group to constitute an antitrust violation it must arise out of a predatory intent, however it is described, whether, as Mr. Justice Douglas said, "to do in one or more competitors," or as Mr. Justice White said "with the purpose and effect of driving the small marginal operators out of business" or, as the plaintiff itself has expressed it, "with the purpose to eliminate competitors," or, again as Mr. Justice White has said, where the wage scales demanded are "ruinous to the business of the other employers." And this is the view of the *Pennington*-type case as phrased in other decisions and in the opinions of commentators. To repeat: it is not enough that the Union may have entered into a contract with a multi-employer unit in a national industry to establish

[38]

an antitrust violation by the Union or, for that matter, the employer-group. That may in some cases take the action out of the exemption enjoyed by labor but it will not per se amount to an antitrust violation. To amount to an antitrust violation the agreement must be rooted in an anti-

---

[45] 434 F.2d at 783. The Supreme Court denied certiorari in this case, 402 U.S. 983 (1971).

competitive purpose, and must effect an anti-competitive result, as evidenced by action "ruining" a competitor's business or driving him "out of business." Unless there is such an agreement between the labor organization and the non-labor group and such an anti-competitive result, there is no conspiracy actionable under the anti-trust laws. The district court, however, seems to have found that *Tennessee Consolidated Coal Co. v. United Mine Wkrs. of Am.*, 416 F.2d 1192, was to the contrary and rested its conclusion that there was sufficient evidence of an antitrust conspiracy in this case to require the submission of that issue to the jury on its understanding of that authority, (*i.e.*, *Tennessee Consolidated*). We think the district court misconstrued *Tennessee Consolidated*.

In *Tennessee Consolidated* the critical issue related to the Protective Wage Clause—whether it was sufficiently ambiguous to make its proper construction a question for the jury. The court did not deal with the issue of whether predatory intent was essential to a finding of an antitrust conspiracy in connection with an agreement between labor and non-labor groups or whether there was sufficient evidence in the case of predatory intent or intent to "ruin" marginal operators in order to reduce competition in the coal industry in that case.

[39]

Apparently, the defendants in that case did not dispute that there was sufficient evidence of predatory intent, assuming the Protective Wage Clause was construed as plaintiff argued, to justify the submission of that issue to the jury. In submitting the issue to the jury it must be assumed that the district court followed the rulings of the Sixth Circuit in *South-East Coal*, *Pennington* (2d case) and *Ramsey* (2d case), that predatory intent was an essential element in

plaintiff's claim of a right of action under the Sherman Act. This conclusion is fortified by noting the members of the panel in *Tennessee Consolidated*. They were Judges Weick, Peck and Combs. Two of these judges (Judges Peck and Combs) had been members of the panel which ruled on *Lewis v. Pennington* in 400 F.2d 806, decided one year before *Tennessee Consolidated*. In *Lewis v. Pennington* there was no mistaking the position of the panel. It concluded unequivocally that "intent to eliminate" a competitor or competitors and "predatory intent" were required for a finding of an antitrust conspiracy in a case just like *Tennessee Consolidated*. These same two members of the *Tennessee Consolidated* panel participated in the en banc rehearing in *Ramsey*, 416 F.2d 655, decided exactly seven days after *Tennessee Consolidated*. Both Judges Peck and Combs joined in Judge Edwards' opinion in *Ramsey I*, which reaffirmed unqualifiedly the decision in *Lewis v. Pennington* and, while Judge Weick joined in Judge O'Sullivan's opinion in *Ramsey I*, he did not do so because he thought the ruling in *Lewis v. Pennington* was wrong—in fact, Judge O'Sullivan accepted the binding character of *Lewis v. Pennington* just as

[40]

Judge Edwards had done in his opinion, except on the one issue of measure of proof. It would be incomprehensible to assume that Judges Peck and Combs would have joined the opinion in *Tennessee Consolidated* if the latter opinion were different from *Lewis v. Pennington* in its holding on predatory intent as an essential element of an antitrust conspiracy in this context. We accordingly find nothing in *Tennessee Consolidated* inconsistent with the principle stated supra under which there must be some evidence that the intent of the Union's action was to "ruin"

and to "drive out of business" the plaintiff and other marginal producers, in short, evidence of a predatory intent.

[41]

It is thus manifest from this review of the pertinent authorities applying the *Pennington* doctrine, on which the plaintiff relies for an antitrust conspiracy, that such doctrine requires (a) an agreement between the Union and an employer-group consisting of a substantial number of the larger employers in an industry to establish a wage scale for the employees-of-the-group-members-of-the Union, (b) which wage scale the Union and the employer group knew that the marginal employers in the industry could not afford, and (c) which wage scale the Union undertook to impose on the marginal nonmember operators, (d) with the intent to drive these marginal operators out of business and to remove them as competitors of the employer-group. And this is the view of the *Pennington* model as taken in other decisions and as expressed by commentators.[46] Were the rule otherwise, labor

---

[46] See Consol. Exp., Inc. v. N. Y. Shipping Ass'n., (3d Cir. 1979) 602 F.2d 494, 516; Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc., (5th Cir. 1974) 504 F.2d 896, 903; **Associated Milk Dealers, Inc.** v. **Milk Drivers U., Local 753,** (7th Cir. 1970) 422 F.2d 546, 554; **Lewis** v. **Pennington,** (6th Cir. 1968) 400 F.2d 806, 814, **cert. denied,** 393 U.S. 983; St. Antoine, Connell: **Antitrust Law at the Expense of Labor Law,** 62 Va.L.Rev. 603, 613 (1976): Meltzer, **Labor Unions, Collective Bargaining, and the Antitrust Laws,** 33 U. Chi.L.Rev. 659, 720-21; Cox, **Labor and the Antitrust Laws:** Pennington and Jewel Tea, 46 Boston U.L.Rev. 317, 324 (1967); Comment, **Labor's Exemption from Federal Antitrust Law: The Diminishing Protection for Union Activities,** 28 U.Fla.L.Rev. 620, 629, n. 77; Comment, **Antitrust Law-Most Favored Nation Clause and Labor's Antitrust Exemption,** 19 J.Pub.L. 399, 403 (197_).

Thus Professor Cox in 46 Boston U.L.Rev. at 324, concluded discussion of Pennington with this observation, which is confirmed by later decisions and by the comments of other scholars:

> "In the end, I think, the rule of the Pennington case will be confined to situations in which there is a rather specific agreement to put

(Continued on next page)

[42]

organizations would be subject to liabilities greater than and different from those to which businesses would be subjected. Such a result would mock the congressionally-granted exemptions in favor of labor organizations.

[43]

Under this construction of the *Pennington* line of cases, the first fact to be established by a plaintiff in its proof of an antitrust conspiracy is an agreement between the union and the employer-group to establish a wage scale which both knew the other employers not members of the group, such as the plaintiff, could not meet. The record, however, is completely devoid of any evidence to support any

---

[46](Continued) some of the employers in the industry out of business, established by something more than evidence that the union and signatory employers were aware that marginal operators could not afford to pay the union scale."

In the Comment in 28 **U. Fla. L. Rev.** at 629, the writer said:

"To find a conspiracy [by labor] with a non-labor group, the courts have consistently required proof of predatory purpose or a design to injure or eliminate a competitor."

Dean St. Antoine in 62 **Va. L. Rev.** at 613 finds that

"In **Pennington** the key question was whether a labor agreement dealing with wages would violate the antitrust laws if its purpose was to put certain competitors out of business. The answer was 'yes'."

In **Embry-Riddle**, 504 F. 2d 903, the court said:

"At least in cases falling within the **Pennington** model, for non-exemption and liability to be found the union must be proved to have had a purpose to injure or eliminate the competitor of a company whose employees it represents."

In **Associated Milk Dealers**, 422 F. 2d 554, the court said:

"Therefore, a majority of the Supreme Court in **Pennington** requires proof of predatory purpose as a prerequisite to finding that a most favored nation clause violates the antitrust laws."

(Continued on next page)

such premise in this case. In fact, the evidence conclusively demonstrates the contrary. The plaintiff all through its operations under the 1968 contract, for instance, paid the wages prescribed in that contract and at the same time earned a reasonable, if not an exorbitant, profit.

[44]

Moreover, even as late as 1972 it sought to continue operations under the wage scale fixed in the 1968 contract. And in its development of its damage claim, it claimed that, working under the wage scale fixed in the 1968 agreement, it would have realized what many would have regarded as an excessive rate of profit. Nor did the plaintiff seek to offer any proof that it could not have operated profitably under the wage scale set in the new collective bargaining contract executed in November, 1971. It did, it is true, profess such an inability in the late stages of the negotiations between it and the Union but, when the Union requested an opportunity to verify the claim by a review of plaintiff's records, the plaintiff refused, even though plaintiff was obligated under the National Labor Relations Act to extend to the Union the right to verify the employer's claim of financial inability.[47] The plaintiff's refusal supports the

---

[46](Continued)

In Consolidated Express, 602 F.2d at 516, the court, after carefully reviewing **Pennington** and **Ramsey**, said:

> "Since the three Justices who joined in the Douglas opinion would have upheld the union's claim of antitrust immunity absent a showing of predatory intent, and three others would have upheld the claim of immunity on broader grounds announced by Justice Goldberg, the Douglas opinion may well be read as limiting antitrust liability for agreements concerning subjects at the 'very heart' of the collective bargaining process to cases where predatory intent can be shown."

[47]**See** Note 7 **infra.**

inference that the records would not support the claim, and the plaintiff's evidence in support of its damage claim fully supports the inference.

But the plaintiff not only fails to establish the first requirement of the *Pennington* model, it also fails to offer any credible evidence in support of the second requirement, i.e. that the Union had agreed to impose any such wage scale on the plaintiff. In all the *Pennington*-type cases, proof of this element of the antitrust conspiracy rested basically on the Protective Wage Clause included in the 1958 contract. This Clause, however, was not included

[45]

in the 1964 agreement between the Union and the employer bargaining unit but, since the Clause was not expressly repudiated in the 1964 agreement, it has been held in at least one case that the Clause remained in effect.[48] It is this Clause which, as the Court said in *South-East*, is "the crux of the Union's illegal contract" in all these *Pennington* range of cases, representing the offensive agreement of the Union under the second requirement of *Pennington*. But in 1968 the parties expressly rescinded any prior Protective Wage Clause provision and absolved the Union of any obligation such as plaintiff had argued in the *Pennington*-type cases the Union had assumed.[49]

Since the plaintiff's claim relates to a period after its rescission, an express Protective Wage Clause cannot be relied on to establish any undertaking of the Union by agree-

---

[48] Solar Fuel Company v. United Mine Workers of America, (W.D. Pa. 1972) 346 F. Supp. 789, at 794-95, aff'd., 481 F.2d 1399 (1973), cert. denied, 416 U.S. 909 (1974).

[49] See Solar Fuel Company v. United Mine Workers of America, 346 F. Supp. at 794-95.

(Continued on next page)

ment with the employer-unit to impose a wage scale on nonmember operators. The plaintiff contends that, though the parties had ostensibly rescinded the Protective Wage Clause, they covertly continued

[46]

it in practice thereafter. The only evidence that the plaintiff can marshal in support of this claim that the Union was seeking to continue to compel, at the behest of the employer-group, all nonmember coal operators to conform to the wage scale incorporated in the contract with the multi-employer group is that the Union endeavored to induce all operators with whom it bargained to adopt the terms and conditions of the industry contract negotiated with the multi-employer group. The mere fact that the Union thus sought a uniform wage scale from all employers does not, however, show that such action was by agreement, either express or covert, with the employer-group. The Union had followed this practice from its earliest days as a Union. *Pennington* found such practice perfectly proper.[50] It was not, however, an inflexible practice by the Union.

---

[49](Continued)

Section A of the Protective Wage Agreement is as follows:

"During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto."

[50]381 U.S. at 664-65.

The Union—at least, local units of the Union—agreed to variations in the wage scale in agreement with individual operators. It was because of the frequency of this practice that the employer-group demanded the inclusion of the Protective Wage Clause in the 1958 agreement. The employer-group wanted a specific agreement to protect its members from this practice.[51] Moreover, while the Union sought such uniformity

[47]

in its negotiations in 1971 it was willing to make variations from such uniform scale, as it demonstrated in this case when it offered, if the plaintiff could show financial hardship, to renegotiate the wage scale. All these undisputed circumstances negatived entirely any possibility of a continued covert unwritten agreement between the Union and the employer-group on a Protective Wage Clause.

Finally, even were there some evidence of a continued covert Protective Wage Clause it certainly was not intended as a method of driving the plaintiff out of business. Thus there was a complete absence of predatory intent on the part of the Union. The wage scale offered the plaintiff by the Union was one that the plaintiff could meet, as we shall develop at some greater length later. The plaintiff's reason for abandoning the mines on Peabody's land was not due to the exactions of the wage scale in the 1971-72 contract. It abandoned the operations because of the strike on October 1, 1971, and, according to its evidence, because of the start-up expenses for reopening the mines of the termination of the strike.

As a matter of fact this case is simply not a *Pennington*-type case at all. It satisfies none of the criteria for such

---

[51] See Lewis v. Pennington, 257 F. Supp. at 824.

a case. Neither can the plaintiff find any support for its cause of action on the basis of any of the *Pennington* cases. In finding that it was a *Pennington*-type case, the district court

[48]

misconceived the essential elements of such a case and failed to note the absence of such elements here. What the plaintiff is complaining of is not a conspiracy between a labor organization and a non-labor group. It suffered no injury and can claim no wrong on account of the 1968 agreement between the Union and the multi-employer-group. What it really complains of begins with the strike on the part of the Union at midnight on September 30, 1971. This unilateral action of the Union—taken without collaboration with any outside group and certainly not at the behest of the multi-employer-group—is the beginning point of plaintiff's claim. And all other claims by the plaintiff flow from this event.

The plaintiff's real plaint is that the Union had no right to strike against it on September 30, 1971. It bases this position upon the provision in the 1968 contract which authorizes either party on sixty days' notice in writing prior to September 30 to terminate the contract. The plaintiff says it received no such notice, even though it did know that the Union intended to strike on September 30 and had given notice to other signatories of the contract. Assuming that the Union had failed to give the plaintiff the required notice of termination of the contract on September 30 and that the strike was a breach of the Union's agreement with the plaintiff, the latter might have had a remedy against the Union under Section 303

[49]

of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187, see ***Riverton Coal Co. v. United Mine Workers of***

America, (6th Cir. 1972) 453 F.2d 1035, *cert. denied*, 407 U.S. 915, but certainly not a remedy under the antitrust laws, *Larry R. George Sales Co. v. Cool Attic Corp.*, (5th Cir. 1979) 587 F.2d 266, 274; *Salerno v. American League of Prof. Baseball Clubs*, (2d Cir. 1970) 429 F.2d 1003, 1004, *cert. denied*, 400 U.S. 1001 (1971); *McAlpine v. AAMCO Automatic Transmissions, Inc.*, (E.D. Mich. 1978) 461 F. Supp. 1232, 1264; *see also Gateway Coal Co. v. Mine Workers*, (1974) 414 U.S. 368.

The argument is also made that the Union while engaged in a strike refused to negotiate with the plaintiff between October 1 and November 16, and that this represented an antitrust conspiracy. As a factual basis for this claim the plaintiff points to its interview with its employees on September 30, when Baker, its operating head, requested the employees not to strike on the next day, promising in turn that he would sign on the plaintiff's behalf a stipulation to be bound retroactively to October 1 by any wage provisions which might be agreed upon as a result of the negotiations between the Union and the multiemployer group. By this statement the plaintiff expressed no desire to negotiate a full colltive bargaining contract; it recognized it was beyond its competency to deal adequately with the whole range of working conditions to be embraced in a complete collective bargaining agreement. What it was actually requesting of the Union was that the Union members continue to work in its mines with only an agreement on wage rates to be later negotiated and without any other agreement; in short, it

[50]

was asking the Union to abandon its traditional rule of "no contract, no work." The Union refused. In refusing to negotiate such a contingent agreement with the plaintiff,

and in delaying to request negotiations with the plaintiff until November 16, the Union was not acting in concert with any non-labor group, but was, as the district court aptly remarked, attempting in its own interest and in that of its members to protect "[t]he integrity of a nationwide industry strike."[52] It may be that it did prefer to proceed first to negotiate with the multi-employer-group but, if it did, this was its right, as Mr. Justice White had declared in *Pennington*. Again, this, however, was a unilateral decision of the Union, taken in what it conceived to be the interests of its members, and could not support an antitrust claim.

[51]

After November 16 the plaintiff was offered a contract by the Union (UMW). The plaintiff offered no objection to the contract or any of its provisions on that date. It made no request for changes. It simply said it was prevented from signing the contract because it had the day before signed a contract with another Union. By signing that contract with another Union (SLU)—a voluntary act on the part of the plaintiff—it disqualified itself, in its view, from negotiating with the UMW, though apparently UMW continued to represent a majority of plaintiff's employees. When later an unfair labor charge against the plaintiff arising out of plaintiff's contract with the other Union (SLU) was dismissed, the plaintiff again dallied about negotiating a contract with UMW, asserting that it

---

[52] The district court said:

"Plaintiff can scarcely be heard to argue that the UMW's refusal to allow plaintiff to continue to operate, under a mere stipulation to be retroactively bound to the new agreement, was a manifestation of a conspiracy to drive small operators out of business. The integrity of a nationwide industry strike could not be maintained if such variations were allowed to prevail." 457 F. Supp. at 1133.

had to have written confirmation from the National Labor Relations Board of the dismissal. A little later when pressed by UMW to negotiate, the plaintiff, having employed the counsel who had handled the *Pennington* case and the other cases it spawned, first asserted as an excuse for not signing the UMW contract that it could not afford the wage scale in the new contract. The UMW countered this claim with a request to see the plaintiff's books[53] and, when refused, offered to renegotiate the agreement if, after the reopening of the mines,

[52]

the plaintiff contended it could not operate profitably under the agreement. At this point the plaintiff would argue that the representative of the Union, with whom it had been dealing for some weeks, was without authority to bind the Union. It is obvious that this whole record is more an indication of dalliance on the part of the plaintiff than by the Union; but, irrespective of which party dallied, such dalliance would not be an antitrust violation.

Though the plaintiff did not assert it at the time as a ground for objecting to the 1971 contract, the Coal Lands Clause in that contract (as well as in the 1968 contract) is cited now as infecting both the 1971 and 1968 contracts with an obligation, not on the Union as in the Protective Wage Clause, but on the employers, as a mechanism employed by the parties to those agreements to effect an antitrust violation. Presumably this is now asserted as a ground for the plaintiff's failure to agree to the 1971 contract. The Coal Lands Clause in one form or another; however, has been incorporated in every UMW contract since 1943, when the War Labor Board ordered its inclu-

[53] See Notes 7 and 47 infra.

sion in all collective bargaining agreements in the coal industry.[53] Such a Clause is within the scope of mandatory collective

[53]

bargaining.[54] It is not tainted by any requirement which would limit the rights of the Union in its bargaining with other parties —the point which Mr. Justice White found might be inherent in the PWC if that Clause were properly to be construed as limiting the power of the Union to negotiate with other employers than those in the multi-employer group. Nor was the Coal Lands Clause intended to do other than to protect the legitimate interests of the Union; it was not at all an attempt, in concert with the multi-employer-group, to "ruin" any party's business or to drive such party out of business. Devoid of any predatory purpose, intended only to serve the legitimate interests of the Union's constituency, and binding only the parties themselves, the Coal Lands Clause is insufficient

---

[53] See **Lewis v. Pennington,** 257 F. Supp. at 824:

"A 1943 order of the National War Labor Board directed that each UMW contract include a provision relating to leased mines, that 'Operators agree that they will not lease any operating mines subject to this Agreement as a subterfuge' to avoid the Agreement's provisions. This cause by reference was contained in the Ickes-Lewis Agreement in 1943 and in the National Bituminous Coal Wage Agreement of 1945. The 1952 Agreement provides that operators 'agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this Agreement.' It expresses a covenant which the basic agreement would in any event imply."

In all the Agreements, including the 1968 and 1972 Agreements, the application of the Clause is always limited to the use of the lease as a "subterfuge to avoid the application of the collective bargaining agreement."

[54] See Note 24 infra.

as a matter of law to support an antitrust action by the plaintiff, particularly since there is no showing whatsoever that the plaintiff was ever frustrated in its business by such Clause.[55]

[54]

It is of interest that the plaintiff in *Pennington* raised this same issue of the Coal Lands Clause as well as the Eighty Cent Clause but appears to have abandoned it on appeal, prompting this comment by the Court of Appeals in the second appeal of *Pennington*:

> "However, plaintiffs do not on this appeal advance a claim of a concerted refusal to deal, and a review of the record in light of the District Court's finding concerning these clauses (i.e., the Coal Lands Clause and the Eighty Cent Clause) (257 F. Supp. at 862) demonstrates that no Sherman Act violation could be founded on those clauses under *Hutcheson* . . . . and *Allen Bradley* . . . ."[56]

The same situation prevails in this case and warrants the same disposition as was given the clause in *Lewis v. Pennington*. Moreover, what has been said about the Coal Lands Clause is equally applicable to the Eighty Cent Clause, a provision also dealt with in *Lewis v. Pennington* adversely to any claim by the plaintiff here. It should further be noted that the plaintiff can base no claim on this Eighty Cent Clause because it makes no allegation that it intends to buy coal from others and thus is prejudiced by this

---

[55] Cf. Allen Bradley, 325 U.S. at 809, where the Court assumed that an agreement "not to buy goods manufactured by companies which did not employ the members of Local No. 3. . . . standing alone would not have violated the Sherman Act.

[56] 400 F.2d at 813.

Clause in that it was ever frustrated in its sales by the Clause. In effect the Eighty Cent Clause has no real place in this case.

[55]

After all is said and done and after *Pennington* and all its brood are carefully reviewed, the fact remains that what the plaintiff is complaining of is that the Union struck its mines in October and that, until there was some agreement, it had refused to agree for its members to engage in maintenance work in the plaintiff's mines, as a result of which it was not able to continue the operation of its mines. That and that only is what this suit is about. That and that alone represents the events which caused such injury as the plaintiff asserts. For those acts, however, there can be no antitrust liability on the part of the Union. They represent actions taken unilaterally by the Union, without consultation or by agreement with the employer-unit, solely with a view to the interests and legitimate objectives of its members. There was no combination with employers in either the strike or in the refusal to allow maintenance work in the plaintiff's mines. Moreover, both of these actions were protected by labor's statutory exemption.

We conclude that on this record there was insufficient evidence of an antitrust conspiracy on the part of the defendant to permit the submission of that issue to the jury and the district court should have so ruled. Even were this not so, the plaintiff failed in its proof to offer sufficient evidence of damages by reason of any conduct of the Union for the reasons stated by the district court in its detailed analysis of the evidence.

The grant of judgment n.o.v. by the district court is affirmed both for the reason stated by the district court and for the failure of the plaintiff to adduce sufficient proof of an antitrust violation to permit the submission of such issue to the jury.

The judgment of the district court is accordingly.

AFFIRMED.

APPENDIX B

STATUTES INVOLVED

15 USCA:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
As amended Dec. 21,1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, §2, 89 Stat. 801

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 73.

§ 17. Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraints of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

---

29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§ 52. Statutory restriction of injunctive relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employ-

ees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

Appendix B

29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102: Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 4 Stat. 70.

---

29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act):

§ 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

Appendix B

Labor Management Relations Act, 1947 (29 USCA):

§ 141. Short Title; Congressional Declaration of Purpose and Policy

(a) This chapter may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, 3:17 p.m., E.D.T., c. 120, § 1, 61 Stat. 136.

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly ad-

justment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 136.

---

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain

collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140.

§ 158. Unfair labor practices

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents——

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

* * *

July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601.

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*,

That nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and

conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer,

contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and cloth-ing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception. As amended September 14, 1959; Pub.L. 86-257, Sec. 704(b).

---

§ 185. Suits by and against labor organizations —venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

(b) . . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States . . . . June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 301, 61 Stat. 156.

CONSTITUTION

AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.